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Nos. 43 and 88

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

FIRST SECURITY BANK OF UTAH, N.A.,
Petitioner,

v.

COMMERCIAL SECURITY BANK,
Respondent.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

COMMERCIAL SECURITY BANK,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT

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INDEX

	Page
OPINIONS BELOW	1
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	4
SUMMARY OF ARGUMENT	7
ARGUMENT	12
I. The Courts Below Properly Held That the Comptroller of the Currency Was Without Statutory Authority to Authorize First Security Bank of Utah to Establish a Branch Bank in Ogden, Utah	12
A. In the National Bank Act, Congress has adopted a "policy of equalization" between national and state banks	12
B. No where has the congressional "policy of equalization" been more forcefully expressed in the National Bank Act than in Section 36(c) wherein Congress required the Comptroller to follow state law as the standard for the establishment of branches of national banks	18
C. The construction given to Section 36(c)(1) of the National Bank Act by the Comptroller conflicts with the plain meaning of the words used therein, and violates congressional intent to insure competitive equality between national and state banks in the matter of branching	37
1. The establishment of a *de novo* branch in Ogden, a city with four banks, is not "expressly authorized" under a Utah statute which prohibits *de novo* branches in any city of the size of Ogden "in which is located a bank or banks"	37

Page

2. The Comptroller's construction of Section 36(c)(1) permitting national banks to branch in locations forbidden to state banks is irreconcilable with the principle of competitive equality which Congress sought to establish in Section 36(c), and which is imperative for the very survival of the dual banking system 41

II. The Comptroller's "Anti-Competitive" Argument Is Not Responsive to the Issue in This Case, Misconstrues the Legislative History of Section 36(c), and Is Self-Contradictory 44

III. No Weight Should Be Ascribed to the Incumbent Comptroller's Construction of Law Made Thirty-Six Years After the Enactment of Section 36(c)(1) and Contrary to All Prior Administrative Practice 57

CONCLUSION 59

APPENDIX A 60

APPENDIX B 64

CITATIONS

Cases:

Anderson Nat'l Bank v. *Luckett*, 321 U.S. 233 (1944) 17

Bank of Dearborn v. *Saxon*, 244 F. Supp. 394 (E.D. Mich. 1965), *appeal pending*, No. 16912, 6th Cir. 9, 35

Chase Securities Corp. v. *Husband*, 302 U.S. 660 (1938) 17

Bank of New Orleans & Trust Co. v. *Saxon*, 211 F. Supp. 576 (D.D.C. 1962), *aff'd sub nom. Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 323 F.2d 290 (D.C. Cir. 1963), *rev'd on procedural grounds*, 379 U.S. 411 (1965) 59

Page

Commercial Security Bank v. *Saxon*, 236 F. Supp. 457 (D.D.C. 1964), *aff'd*, No. 19357, D.C. Cir., November 18, 1965, *cert. granted*, 384 U.S. 925 (May 2, 1966) 14, 16, 33

Commercial State Bank of Roseville v. *Gidney*, 174 F. Supp 770 (D.D.C. 1959), *aff'd per curiam*, 278 F.2d 871 (D.C. Cir. 1960) 9, 33

First Nat'l Bank v. *Missouri*, 263 U.S. 640 (1924) 17, 18

First Nat'l Bank of Smithfield v. *Saxon*, 352 F.2d 267 (4th Cir. 1965) 41

Hoosier State Bank v. *Saxon*, 248 F. Supp. 233 (N.D. Ind. 1965), *appeal pending*, Nos. 15561, 15562, 7th Cir. 9, 35

Jackson v. *First Nat'l Bank of Valdosta*, 349 F.2d 71 (5th Cir. 1965) 8, 34

Lewis v. *Fidelity & Deposit Co.*, 292 U.S. 559 (1934) 8, 14, 17, 33, 34, 40

McClellan v. *Chipman*, 164 U.S. 347 (1896) 17

M'Culloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 12

National Bank of Detroit v. *Wayne Oakland Bank*, 252 F.2d 537 (6th Cir.), *cert. denied*, 358 U.S. 830 (1958) 9, 34, 45

Peoples Bank-Trenton v. *Saxon*, 244 F. Supp. 389 (E.D. Mich. 1965) 9, 35

Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 58

South Dakota v. *National Bank of South Dakota*, 219 F. Supp. 842, (D.S.D. 1963), *aff'd*, 335 F. 2d 444 (8th Cir. 1964), *cert. denied*, 379 U.S. 970 (1965) 9, 35

State Chartered Banks in Washington v. *Peoples Nat'l Bank of Washington*, Civ. No. 6338, W.D. Wash., February 28, 1966 ..... 9, 36

Suburban Trust Co. v. *National Bank of Westfield*, 222 F. Supp. 269 (D.N.J. 1963) 9, 35

Union Savings Bank of Patchogue v. *Saxon*, 335 F.2d 718 (D.C. Cir. 1964) 8, 35

United States v. *First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665 (1964) 10, 46

Page

United States v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) 10, 46, 47
Walker Bank & Trust Co. v. *Saxon*, 234 F. Supp. 74 (D. Utah 1964), *aff'd*, 352 F.2d 90 (10th Cir. 1965), *cert. granted*, 384 U.S. 925 (May 2, 1966) 33
Walker Bank & Trust Co. v. *Taylor*, 15 Utah 2d 234, 390 P.2d 592 (1964) 38
Westfall v. *United States*, 274 U.S. 256 (1927) 50
Whitney Nat'l Bank v. *Bank of New Orleans & Trust Co.*, 323 F.2d 290 (D.C. Cir. 1963), *rev'd on procedural grounds*, 379 U.S. 411 (1965) 59

Statutes:

UNITED STATES CODE, Title 12:

Sec. 36, 44 Stat. 1228-9 (1927), 48 Stat. 189-90 (1933) 9, 10, 21, 36-37, 40-43, 48-51
Sec. 51, 48 Stat. 185 (1933) 16
Sec. 85, 48 Stat. 191 (1933) 16
Sec. 92a, 76 Stat. 668 (1962) 15
Sec. 214c, 64 Stat. 456 (1950) 16
Sec. 321, 44 Stat. 1229 (1927) 21, 32
Sec. 371, 44 Stat. 1224-5 (1927) 16
Sec. 548, 44 Stat. 223-4 (1927) 17
Sec. 1846, 70 Stat. 138 (1956) 17
Sec. 1828(c), 12 U.S.C.A. § 1828(c) (Supp., Mar. 1966) 47

UNITED STATES CODE, Title 15:

Secs. 1-7, 26 Stat. 209-10 (1890) 10, 46
Sec. 18, 38 Stat. 731 (1914) 10, 46

Public Law 89-356, Feb. 1, 1966, 12 U.S.C.A. § 1828(c) (Supp., Mar. 1966) 47
Conn. Public Acts 1933, ch. 274, § 1 51
Idaho Laws 1933, ch. 71, § 1, p. 116 51
Me. Laws 1933, ch. 34, pp. 184-85 51
Mass. Acts 1922, ch. 396, p. 419 51
Ore. Laws 1933, ch. 150, § 3, p. 172 51
Utah Laws 1933, ch. 6, § 1, p. 8 51

Page

UTAH CODE ANN.:

Sec. 7-1-26 (Supp. 1965) 48
Sec. 7-3-6 (Supp. 1965) 8, 37-39, 41
Sec. 7-6-2 (1953) 47
Sec. 7-6-4C(1) (1953) 48
Sec. 7-6-4C(4) (1953) 47
Sec. 10-1-1 (1953) 4

Va. Laws 1928, ch. 507 § 13, p. 134 51
Wash. Laws 1933, ch. 42, § 5, pp. 228-9 51

Congressional Material:

65 CONG. REC. 11296 (1924) 20
11297 (1924) 21
11298 (1924) 21
66 CONG. REC. 924 (1924) 52
1577 (1925) 19, 52
67 CONG. REC. 2834 (1926) 52
68 CONG. REC. 5815 (1927) 24
75 CONG. REC. 9892 (1932) 26, 55, 56
9896 24
9897 (1932) 26
9974 (1932) 26
76 CONG. REC. 1330 (1933) 30, 31
1449 (1933) 27
1995 (1933) 26
1997 (1933) 27
2079 (1933) 28, 29
2080 (1933) 28
2205 (1933) 29
2206 (1933) 30
2207 (1933) 29
2208 (1933) 29, 30
77 CONG. REC. 3726 (1933) 30, 31, 51
5862 (1933) 31
5896 (1933) 32

Hearings before the House Committee on Banking and Currency on H.R. 6855, 68th Cong., 1st Sess. (1924) 19

Page

Hearings before the House Committee on Banking and Currency (Financial Institutions Act of 1957), 85th Cong., 1st Sess. (1957) 57-58
Hearings before the Senate Committee on Banking and Currency (Study of Banking Laws), 84th Cong., 2d Sess. (1956) 57
Hearings before a Subcommittee of the Senate Banking and Currency Committee Pursuant to S. Res. 71, 71st Cong., 3d Sess. (1931) 24
H.R. REP. No. 83, 69th Cong., 1st Sess. (1926) 21, 22
H.R. REP. No. 150, 73d Cong., 1st Sess. (1933) 30
H.R. REP. No. 254, 73d Cong., 1st Sess. (1933) 31
H.R. REP. No. 583, 68th Cong., 1st Sess. (1924) 20
H.R. REP. No. 1481, 69th Cong., 1st Sess. (1926) ... 23
H.R. REP. No. 2423, 82d Cong., 2d Sess., (1952) 24
S. REP. No. 77, 73d Cong., 1st Sess. (1933) 30
S. REP. No. 473, 69th Cong., 1st Sess. (1926) 22, 23
S. REP. No. 584, 72d Cong., 1st Sess. (1932) 25, 26

Miscellaneous:

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, BANKING STUDIES (1941) 13, 18
COMPTROLLER OF THE CURRENCY, ANNUAL REPORT (1923), H.R. DOC. No. 90, 68th Cong., 1st. Sess. (1924) 18, 49
COMPTROLLER OF THE CURRENCY, ANNUAL REPORT (1924), H.R. DOC. No. 457, 68th Cong., 2d Sess. (1925) 19, 49
COMPTROLLER OF THE CURRENCY, ANNUAL REPORT (1962) 54
COMPTROLLER OF THE CURRENCY, ANNUAL REPORT (1963) 54, 59
COMPTROLLER OF THE CURRENCY, ANNUAL REPORT (1964) 54
CONANT, A HISTORY OF MODERN BANKS OF ISSUE (1915) 12
FEDERAL DEPOSIT INSURANCE CORPORATION, ASSETS, LIABILITIES, AND CAPITAL ACCOUNTS, COMMERCIAL AND MUTUAL SAVINGS BANKS, REPORT OF CALL No. 74 (Dec. 31, 1965) 43

Page

FEDERAL DEPOSIT INSURANCE CORPORATION, OPERATING BANKS INSURED BY THE FEDERAL DEPOSIT INSURANCE CORPORATION (January 1, 1966, Jan.-July Supps.) 52

KANE, THE ROMANCE AND TRAGEDY OF BANKING (1923) 12

PROCHNOW, AMERICAN FINANCIAL INSTITUTIONS (1961) 12

Shull and Horvitz, *Branch Banking and the Structure of Competition*, 1 NATIONAL BANKING REVIEW 301-343 (Mar. 1964) 53-54, 56

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 73

FIRST SECURITY BANK OF UTAH, N.A.,
Petitioner,

v.

COMMERCIAL SECURITY BANK,
Respondent.

No. 88

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

COMMERCIAL SECURITY BANK,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT

I.

OPINIONS BELOW

The opinion of the district court is reported at 236 F. Supp. 457, and appears in the transcript of record at

First Security R. 25-33 and Saxon R. 28-37.[1] The court of appeals affirmed the district court by order. Its judgment has not been reported but appears in the transcript at Saxon R. 38-39. The opinion in *Walker Bank & Trust Co.* v. *Saxon*, 352 F.2d 90 (10th Cir. 1965), relied upon by the court of appeals, appears at Logan R. 37-45.

II.

QUESTION PRESENTED

Whether, pursuant to Section 36(c)(1) of the National Bank Act, the Comptroller of the Currency may authorize a national bank to establish a *de novo* branch in a city where state law prohibits a state bank from establishing such a branch.

III.

STATUTES INVOLVED

A.

Section 36(c) of Title 12 of the United States Code, as amended, provides in part:

> "36. . . . (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches:
>
> (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly author-

[1] The reference to "First Security R" is to the printed record in this Court in No. 73. Similarly, the record in No. 88 will be referred to as "Saxon R," and the record in No. 51, with which these two cases have been consolidated, will be referred to as "Logan R." Only the "Saxon R" transcript will hereinafter be cited when there is a duplication in the transcripts.

ized to State banks by the law of the State in question; and

(2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks."

Section 36(c)(1) relating to "inside" branches (branch offices of a bank located in the municipality in which the main office of the bank is located) is the statutory provision directly involved in this case. It contains provisions first enacted in the McFadden Act of 1927, 44 Stat. 1228 (1927), and re-enacted in the Banking Act of 1933, 48 Stat. 189 (1933). Section 36(c)(2) relating to "outside" branches (branch offices of a bank located at any point in a state other than in the municipality in which the main office is located) contains provisions first enacted in the Banking Act of 1933, 48 Stat. 190 (1933).

B.

The Utah Code Ann. § 7-3-6 (Supp. 1965) provides in part:

"The business of every bank shall be conducted only at its banking house and every bank shall receive deposits and pay checks only at its banking house except as hereinafter provided.

* * * *

"Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where

there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years."

IV.

STATEMENT

Section 36(c)(1) of the National Bank Act provides that the Comptroller of the Currency may authorize a national bank to establish a new branch within its home municipality if the establishment of such a branch is "expressly authorized" to state banks by the law of the state in question.

Section 7-3-6 of the Utah Code prohibits a state bank from establishing a new branch bank in any city, other than in a city of the "first class,"[2] in which there is already one or more banks in operation, unless such a branch is one resulting from an acquisition of a unit bank wherein an acquiring bank continues to operate the offices of the acquired bank as a branch. In other words, *de novo* branching is entirely prohibited in any city in Utah where there is an existing bank or banks, other than in a city of the "first class," but the continued operation of the office of an acquired bank as a branch is permitted.

The City of Ogden, Utah, is a city of the "second class" (Saxon R. 23) and, therefore, branching in Ogden is governed by the provisions of Section 7-3-6 of the Utah Code discussed above. At the time this action commenced, there were four operating banks in the City of Ogden: (1) the Respondent, a state bank; (2) the Petitioner, First Secur-

[2] A city of the "first class" is defined under the statute law of Utah as one with a population in excess of 90,000 persons while a city of the "second class" is defined as one with more than 30,000 and less than 90,000 persons. Utah Code Ann. § 10-1-1 (1953).

ity Bank of Utah, N.A., a national bank; (3) the Bank of Utah, a state bank; and (4) the Bank of Ben Lomand, a state bank. (Saxon R. 23).[3]

On June 25, 1963, First Security filed an application with the Comptroller of the Currency, to establish a *de novo* branch in Ogden. (Saxon R. 2). On July 18, 1963, the Respondent brought an action in the district court seeking declaratory and injunctive relief against the issuance by the Comptroller of a certificate of authority permitting First Security to establish such a branch. Respondent alleged that the issuance of such a certificate would violate the provisions of Section 36(c)(1) of the National Bank Act incorporating state law as the standard for branches of national banks, in view of the provisions of Section 7-3-6 of the Utah Code prohibiting *de novo* branching of state banks in Ogden where there are already four banks in operation. (Saxon R. 2). On June 9, 1964, the Comptroller approved the branch of First Security but, pursuant to stipulation with Respondent, has withheld the issuance of a certificate permitting First Security to open the branch. (Saxon R. 23-24).

The Comptroller moved to dismiss Respondent's complaint. (Saxon R. 21). The Respondent filed a cross-motion for summary judgment. (Saxon R. 22). Subsequently, First Security, which had been granted leave to intervene, also filed a motion for summary judgment. (First Security R. 19, 22-23).

On December 18, 1964, the district court issued a memorandum and order granting the Respondent's motion and enjoining the Comptroller from issuing the contested certificate of authority. The court held that the "purpose" of Section 36(c) of the National Bank Act was to

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[3] In addition, both Petitioner, First Security, and Respondent operate a branch in Ogden established prior to the enactment of Utah branch law pertinent to this case. A new unit bank has been established since this action was commenced.

establish "competitive equality" between national and state banks in the matter of branching (Saxon R. 34), and that "if the Comptroller were permitted at this time to authorize branches for national banks when other banks in the city in question were not at the time and under the same conditions permitted by state law to branch, . . . the purpose of Congress in enacting clause (1) of subsection (c) would not be met." (Saxon R. 35).

The appeals of both the Comptroller and First Security from the decision of the district court were consolidated. The court of appeals affirmed the district court's decision on the authority of the opinion of the Court of Appeals for the Tenth Circuit in *Walker Bank & Trust Co.* v. *Saxon.* (Saxon R. 38-39). That case, now before this Court as No. 51, also involved approval by the Comptroller of a *de novo* branch by a national bank in Logan, Utah, a city of the "second class" in which there was an existing operating bank.[4] The Tenth Circuit Court of Appeals, like the district court in Nos. 73 and 88, concluded from a study of the legislative history of Section 36(c) of the National Bank Act, that ". . . Congress intended to create and maintain a competitive equality between state and national banks" in the matter of branching, and that it had done so by acceding to state law as the standard for branches of national banks. (Logan R. 56). Noting that under Utah law a state bank could not establish a *de novo* branch in Logan because there was an operating bank in that city (Logan R. 51), the court of appeals held that to permit a national bank to establish a *de novo* branch in Logan would violate both the letter and intent of Section 36(c)(1) of the National Bank Act. (Logan R. 55-56).

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[4] At the time the action commenced, the First National Bank of Logan was an operating bank in Logan, Utah. (Logan R. 12). Its application to establish a *de novo* branch in Logan was challenged by the Walker Bank & Trust Co., a state bank with its main office in Salt Lake City and a branch in Logan. (Logan R. 1-5, 11-13).

Accordingly, both Nos. 73 and 88 (the Ogden, Utah case) and No. 51 (the Logan, Utah case) raise the same issue of whether, pursuant to Section 36(c)(1) of the National Bank Act, the Comptroller may authorize a national bank to establish a *de novo* branch in a city of the "second class" in Utah where state law prohibits a state bank from establishing such a branch.[5]

SUMMARY OF ARGUMENT

The statutes of the fifty states relating to branches of state banks vary widely. (See Appendix A). They reflect the particular needs of each state relative to their differing economies, as well as divergent philosophies of the degree of protection which should be afforded small unit banks throughout the state from branches of large city banks. Thus, some sixteen states prohibit all branching. Twelve other states permit unlimited statewide branching. The remaining twenty-two states take a "middle ground" with widely varying restrictions. Unrestricted branching may be confined (a) to the city and/or county of the head office and/or contiguous counties; (b) to a specified mileage radius of the head office; or (c) to any of the foregoing dependent upon a minimum population or population range. Utah, for example, permits unrestricted branching in its largest city, Salt Lake City, termed a city of the "first class," but restricts branching in the cities of the state with a lesser population.

The most common provision to be found in the "middle ground" states is a prohibition against branching in a designated area where there already is an existing bank. In twelve states with such a provision (including Utah)

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[5] The Petitioner in No. 51, the First National Bank of Logan, has challenged the standing of the Respondent therein to sue. Petition for Certiorari, *First National Bank of Logan* v. *Walker Bank & Trust Co.*, No. 875 October Term, 1965, at p. 3 (No. 51, October Term, 1966). No such question is before this Court in Nos. 73 and 88.

there is an exception to this prohibition in that a branch may be established if it is as the result of an acquisition of an existing unit bank wherein the acquiring bank continues to operate the office of the acquired bank as a branch. (Appendix B). Further, in order to prevent an avoidance of branch restrictions through a program of establishing new unit banks simply for the purpose of acquisition and conversion to a branch, some states impose a time period during which the acquired bank must have been in operation before it was acquired. Utah, for example, provides that the acquired bank must have been in operation five years. Utah Code Ann. § 7-3-6 (Supp. 1965).

The existence of such a multiplicity of varying state branch laws creates a very practical problem. It is obvious that without competitive equality in such an important area as the right to branch between state and national banks operating side by side in each state, the "dual banking system" could not long survive. The class of banks suffering from the competitive disadvantage would quickly convert to the other system. In recognition of this fact, Congress has established a "policy of equalization" between state and national banks in the matter of branching by prescribing state law as the standard for the establishment of branches by national banks under Section 36(c) of the National Bank Act. That Congress intended to establish such competitive equality between state and national banks in the matter of branching clearly emerges from the language of Section 36(c) and from a study of the legislative history of Section 36(c) (pp. 18-32, *infra*). Further, it is established law. The principle of competitive equality underlies the decisions of the courts of the District of Columbia and of the Tenth Circuit, now before this Court, and has been previously recognized by this Court in *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559, 564-565 (1934), and by numerous lower courts.[6]

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[6] See, *e.g.*, *Jackson* v. *First Nat'l Bank of Valdosta*, 349 F.2d 71, 74 (5th Cir. 1965); *Union Savings Bank of Patchogue* v. *Saxon*,

The construction given to Section 36(c)(1) of the Act by the incumbent Comptroller of the Currency, some thirty-six years after its enactment and without any prior administrative practice, is totally irreconcilable with either the letter or intent of the law. Section 36(c)(1) permits national banks to establish new branches only if their establishment would be *expressly authorized* to state banks by the law of the state in question. It is impossible to understand how *de novo* branches can be said to be expressly authorized in Ogden, a city with four banks, under a Utah statute which prohibits *de novo* branches in any city the size of Ogden "in which is located a bank or banks." Further, the Comptroller's construction of Section 36(c) utterly destroys the congressional intent to establish competitive equality between state and national banks in the matter of branching. The clear result of his action is to permit national banks to establish *de novo* branches in locations where state banks are *prohibited* by state law from establishing such branches.

The Comptroller's argument that Congress actually intended a competitive advantage to national banks in Utah and in the eleven other states with similar statutes, is premised upon an erroneous play on words. He argues that the Utah statute permits unrestricted branch banking subject to the "method" of "take-over" which is not

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335 F.2d 718 (D.C. Cir. 1964); *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537, 540 (6th Cir.), *cert. denied*, 358 U.S. 830 (1958); *State Chartered Banks in Washington* v. *Peoples Nat'l Bank of Washington*, Civ. No. 6338, W.D. Wash., February 28, 1966; *Hoosier State Bank* v. *Saxon*, 248 F. Supp. 233, 236 (N.D. Ind. 1965), *appeal pending*, 7th Cir., Nos. 15561, 15562; *Bank of Dearborn* v. *Saxon*, 244 F. Supp. 394, 401 (E.D. Mich. 1965), *appeal pending*, No. 16912, 6th Cir.; *Peoples Bank-Trenton* v. *Saxon*, 244 F. Supp. 389 (E.D. Mich. 1965); *Suburban Trust Co.* v. *National Bank of Westfield*, 222 F. Supp. 269 (D.N.J. 1963); *South Dakota* v. *National Bank of South Dakota*, 219 F. Supp. 842, 846 (D.S.D. 1963), *aff'd*, 335 F.2d 444 (8th Cir. 1964), *cert. denied*, 379 U.S. 970 (1965); *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770, 774 (D.D.C. 1959), *aff'd per curiam*, 278 F.2d 871 (D.C. Cir. 1960).

among the "whether and where" state branch restrictions made applicable to national banks in Section 36(c). But the Utah statute provides that there shall be "no branch" established in a city where there is located an existing bank, except for the continued operation of the offices of an acquired bank by an acquiring bank. That is a *flat* prohibition against *de novo* branching, which is the issue here involved. Further, when a state prohibits *de novo* branching in any city "in which is located a bank or banks," that is just as much a clear cut statutory statement of "whether" branches can be established, and "where" branches can be established, as is a provision which states there shall be no branching at all, or no branching outside of the city, or no branching outside of the home office county. All of these provisions specify a *location* at or in which branching is restricted.

The Comptroller further argues that the "take-over" provision in the Utah statute "encourages" bank mergers, leading to an undesirable banking "concentration" contrary to the public policy revealed in the federal antitrust and bank merger statutes,[7] and contrary to the legislative intent of Section 36(c) of the Act revealed in the arguments of the opponents of branch banking. The argument is irrelevant. Even if the "take-over" provision were not in the Utah statute, as far as national banks were concerned, the Comptroller would still be left with the remainder of the statute prohibiting *de novo* branching under the circumstances here present, which is the issue in *this* case. Further, the argument is erroneous. A branch by "take-over" is not an independent branch authorization, as is that of a *de novo* branch. It is a *re-*

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[7] Sherman Anti-Trust Act, 15 U.S.C. §§ 1, 2 (1964); Clayton Act, 15 U.S.C. § 18 (1964); Bank Merger Act of 1960, as amended, 12 U.S.C. § 1828(c) (1964), and P.L. 89-356, Feb. 1, 1966. See, *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *United States* v. *First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665 (1964).

sultant from another transaction, namely, the acquisition of one bank by another, which is the subject of antitrust and bank merger statutes designed to prevent all of the evils of banking concentration extensively hypothecated in the Comptroller's Brief. Only after an acquisition has survived the scrutiny of such laws does the issue of the disposition of the office of the acquired bank even arise. Some states require the office to be closed if branches are otherwise forbidden. Some states, like Utah, permit the continued operation of the banking office. Such authority, of course, can be highly beneficial, as in the case of the acquisition of a failing bank by another bank which continues to provide banking service to the public from the existing office of the acquired bank as a branch.

Finally, the Comptroller has misconstrued the legislative history of the McFadden Act of 1927, and of the Banking Act of 1933, in contriving his theory that a "take-over" provision was not "in the minds of the opponents" of branching when they "compromised" with the proponents of branching in agreeing to Section 36(c). The McFadden Act of 1927 was *not* motivated by any desire to extend branch banking to communities where that sort of banking could be useful. It was motivated by the sheer necessity of giving national banks competitive equality with state banks in cities where state law permitted state banks to branch in order that the national banking system would survive. The Banking Act of 1933 reaffirmed that principle of competitive equality. Branch restrictions similar to those in the Utah statute were in existence throughout the period that these two statutes were debated, and had Congress intended to carve such restrictions out as an exception to the principle of competitive equality, it most certainly could have done so. It did not do so, and, therefore, the Comptroller's construction of Section 36(c)(1) patently violates the congressional intent to establish competitive equality between national and

state banks in the matter of branching, upon which depends the continued viability of the dual banking system in this country.

ARGUMENT

I. The Courts Below Properly Held That the Comptroller of the Currency Was Without Statutory Authority to Authorize First Security Bank of Utah to Establish a Branch Bank in Ogden, Utah.

A. *In the National Bank Act, Congress has adopted a "policy of equalization" between national and state banks.*

Respondent does not quarrel with the proposition, advanced with considerable vigor by the Petitioners, that national banks are federal instrumentalities subject to the paramount law of the United States. That issue has long since been resolved in the great constitutional debates which surrounded the creation of the First (1791-1811) and Second (1816-1832) Banks of the United States holding charters from Congress.[8] Although many persons, including Jefferson, who opposed the creation of the First Bank, and Jackson, who vetoed the charter of the Second Bank, felt that Congress had no constitutional authority whatever to charter banks, Chief Justice John Marshall set the matter to rest in his opinion in *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). While recognizing that "it does not appear that a bank was in the contemplation of the framers of the Constitution," he enunciated the doctrine of implied powers and held that a bank could be chartered by Congress as a financial agent of the federal government to assist in the implementation of the federal government's fiscal powers which were specifically

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[8] See e.g., CONANT, A HISTORY OF MODERN BANKS OF ISSUE (1915); KANE, THE ROMANCE AND TRAGEDY OF BANKING (1923); PROCHNOW, AMERICAN FINANCIAL INSTITUTIONS (1961).

granted to Congress by the Constitution. The question of the paramount authority of Congress over national banks has, therefore, long since been settled.

Nor does Respondent quarrel with the corollary to the principle set forth above that Congress, *if* it wished to do so, could have barred the applicability of state law to the operations of national banks. The question, however, which forms the pivotal background for the principal issue in this case, is the *extent* to which Congress elected to permit the applicability of state law to national banks, and, indeed, the extent to which it intended to *adopt* state law as the standard for banking operations of national banks.

The creation of the dual banking system by the addition of a system of national banks under federal charter operating side by side in each state with state banks under state charter required Congress to *affirmatively* decide this question.[9]

The necessity for such affirmative action arose because of the fact that national and state banks are competitors for depositors in each state. It is elementary economics that although state statutes, governing state banks, and the National Bank Act, governing national banks, can (and do) vary in many significant areas, the survival of one or the other class of banks in any state must rest upon an

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[9] It did not do so immediately because the "birth" date of the dual banking system, as we know it today, must realistically be placed some time later than the passage of the National Bank Act. In 1865, Congress placed a prohibitive tax on state bank notes, then the principal source of state bank income, with the avowed purpose of putting state banks out of business. As a result the number of state banks declined drastically and the survival of the state banking system was largely accredited to the growth and profitability of deposit banking. See sources cited in note 8, *supra*. By 1892, however, almost 30 years after the prohibitive bank note tax, the number of state banks overtook the number of national banks and the dual banking system may by then be considered as having been firmly established. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, BANKING STUDIES 15, 418 (1941).

equality in certain basic competitive areas. If one or the other class of banks in a particular state has far more liberal rights and privileges than the other in such important areas as the right to branch, to perform trust functions, to pay interest on deposits, or charge interest on loans, etc., the underprivileged banks would quickly convert to the other system leaving the dual banking system an empty shell. The district court below made this point very succinctly at 236 F. Supp. 460 (Saxon R. 33):

> "It seems clear to the Court that in order for the 'dual banking system' of the United States, consisting of state chartered banks and national banks chartered under the National Bank Act of 1864 (now 12 U.S.C.A. §§ 21-213), to continue to function as such there must be a competitive equality in at least the most important areas of competition between the two systems. If such were not the case, one or the other of the two types of banks, the one with the competitive weight against it, would substantially be driven out of existence, either through failures or conversions to the other class of banking."

Congress solved the foregoing problem in a very practical way:

First, it decided upon a "policy of equalization" between national and state banks by *adopting* state law as the standard for national banks in most of the important competitive areas. *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559 (1934). In that case the question was whether a 1930 amendment to the National Bank Act authorizing a national bank to "give security" for state deposits meant merely a pledge of specific assets or a general lien upon the bank's assets. State banks, competitors of national banks for such deposits, had the right to give the more impressive security of a general lien. This Court ruled in favor of the general lien on the basis of the "policy of equalization" which it held Congress had adopted in the

National Bank Act. At 292 U.S. 564-565, Mr. Justice Brandeis, writing for the Court, said:

> "For the main purpose of the 1930 Act was to equalize the position of national and state banks; and without such power national banks would not in Georgia be upon an equality with state banks in competing for deposits. The *policy of equalization* was adopted in the National Bank Act of 1864, and has ever since been applied, in the provision concerning taxation. In amendments to that Act and in the Federal Reserve Act and amendments thereto the policy is expressed in provisions conferring power to establish branches;[3] in those conferring power to act as fiduciary; in those concerning interest on deposits; and in those concerning capitalization." (Footnotes omitted.) (Emphasis supplied.)

In footnote 3, relating to the policy of equalization as applied to branches, the Court cited both the McFadden Act of 1927 and the Banking Act of 1933 from which subdivisions (1) and (2) of Section 36(c) of the National Bank Act were derived.

Thus, some of the more important instances of the specific adoption of state law in the National Bank Act are as follows: (a) *Branches.* Section 36(c) adopts state law as the standard for the establishment of branches by national banks. 44 Stat. 1228-29 (1927), as amended, 12 U.S.C. § 36(c) (1964). (b) *Fiduciary powers.* The Comptroller may grant a permit to national banks, "when not in contravention of State or local law," to "act as a trustee . . . or in any other fiduciary capacity in which State banks . . . which come into competition with National banks are permitted to act under the laws of the State in which the National bank is located." 76 Stat. 668 (1962), 12 U.S.C. § 92(a) (1964). (c) *Interest on loans.* National banks may charge interest on loans allowed by the law of the state where the bank is

located if such a rate is greater than 1% in excess of the discount rate on ninety-day paper in effect at the local federal reserve bank. 48 Stat. 191 (1933), as amended, 12 U.S.C. § 85 (1964). (d) *Interest on time and savings deposits.* National banks may not pay a greater rate of interest than the maximum rate authorized by law upon such deposits by banks organized under the laws of the state in which the national bank is located. 44 Stat. 1224-25, 12 U.S.C. § 371 (1964). (e) *Capitalization.* In certain instances state law is the measure of allowable capitalization of new national banks. 48 Stat. 185 (1933), 12 U.S.C. § 51 (1964). (f) *Merger and conversion.* No conversion of a national bank to a state bank, or its merger with a state bank, may take place in "contravention of the law of the State in which the National banking association is located." 64 Stat. 456 (1950), 12 U.S.C. § 214c (1964).

The foregoing principle was reflected by the district court below as follows, at 236 F.Supp. 460 (Saxon R. 33):

> "Congress has recognized this need for competitive equality in a manner that protects the state banks and national banks at the same time. In many important areas of the National Bank Act, Congress has incorporated state law as the standard for national banks.[10] In this manner, states are permitted to control national banks to a great extent, but the states must apply the same controls to state banks as they do to the national banks."

Secondly, in addition to specifically applying state law to national banks in many instances, Congress did not seek to occupy the field so as to preclude the application of state laws to national banks which do not conflict with federal law. Sometimes it made a specific reservation of

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[10] 12 U.S.C.A. §§ 36(c), 51, 85, 92(a), and 214c. (Footnote in original.)

power, as for example, the reservation to the state of broad areas of taxation of national banks, 44 Stat. 223-24 (1927), 12 U.S.C. § 548 (1964), and the reservation of powers over bank holding companies, and bank subsidiaries, in the Bank Holding Company Act of 1956, 70 Stat. 138 (1956), 12 U.S.C. § 1846 (1964). The courts have also enunciated this general principal on a number of occasions. Thus in *First Nat'l Bank* v. *Missouri*, 263 U.S. 640 (1924), this Court held—at a time prior to the passage of Section 36(c) of the National Bank Act—that a Missouri statute forbidding branch banks was applicable to national banks. Similarly, in *Lewis* v. *Fidelity & Deposit Co.*, a portion of which opinion is quoted above illustrating the "policy of equalization," this Court upheld the applicability of provisions of Georgia law relating to duties of a depository. 292 U.S. 559, 565-6.[11]

* * * *

It is thus very important to note at the outset of a consideration of the issue in this case that Congress has given a *special* significance to the applicability of state law to the national banks which it has created. It has *intended* an applicability of such law in many of the most important and vital areas of banking. It did so because only by a "policy of equalization" in basic competitive areas can the dual banking system, as a practical matter, survive. It is in this light that the issue before this Court must be considered.

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[11] See, also, *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. 233 (1944); *Chase Securities Corp.* v. *Husband*, 302 U.S. 660 (1938); *McClellan* v. *Chipman*, 164 U.S. 347 (1896).

B. ***Nowhere has the congressional "policy of equalization" been more forcefully expressed in the National Bank Act than in Section 36(c) wherein Congress required the Comptroller to follow state law as the standard for the establishment of branches of national banks.***

A review of the legislative history of Section 36(c) will demonstrate the positive, unequivocal, and dominant expression of congressional intent to insure equality between national and state banks in the matter of branching by the establishment of state law as the standard for branches of national banks.

1. *The absence of competitive equality prior to 1927.* Between 1864 and 1927, the National Bank Act did not provide for the establishment of branches by national banks. This Court had made it clear that, except in the case of certain limited and specifically stated exceptions by Congress, national banks had no authority to branch. *First National Bank* v. *Missouri*, 263 U.S. 640 (1924). The law of many states, on the other hand, permitted state chartered banks to establish branches.

Prior to the turn of the century, this situation created no problem. At that time there only were 87 banks (82 state and 5 national) operating a total of 119 branches, most of which were outside of the head office city. By the end of 1923, however, there were 671 banks (580 state and 91 national) operating 2,054 branches, most of which were in the head office city.[12] In his Annual Report for 1923, the Comptroller of the Currency, after discussing the matter, said:

> "If, however, state member banks engage in unlimited branch banking, it will mean the eventual destruction of the national banking system. . . ." [13]

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[12] BANKING STUDIES, note 9, *supra*, at p. 428.

[13] H.R. Doc. No. 90, 68th Cong., 1st Sess. 6 (1924).

And in his 1924 Report, at which time there were some twenty states permitting some form of branch banking,[14] he said:

> "The question as to whether national banks may be granted the opportunity to meet the competition of state banks in intra-city banking in my opinion involves the question of the perpetuation of the national banking system." [15]

By this time, Congress had become aware of the problem. The House Banking and Currency Committee held hearings in April of 1924 at which the Comptroller of the Currency reiterated his warning. He said:

> "But I would like to get down to the essence of the particular situation confronting us, what I am confronted with every day in my office. Our national banks are very clearly slipping . . . . It is the branch-banking situation which is forcing the issue. For example one bank with $60,000,000 deposits, one of the largest banks in the South, nearly left the system this year and it was only because we were able to persuade them of the probability of legislative relief and that they would be put on a parity with State banks as regards branch banking that they determined to retain their charter." [16]

The House Committee then reported out a bill, the purpose of which was to equalize national and state bank

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[14] Arizona, California, Delaware, Georgia, Maryland, North Carolina, Rhode Island, South Carolina and Virginia permitted statewide branch banking; Maine and Louisiana permitted county-wide branching; and Kentucky, Michigan, Pennsylvania, Tennessee, Wyoming, Massachusetts, Mississippi, New York and Ohio permitted city-wide branching. Some of these states had certain limitations. See 66 Cong. Rec. 1577 (1925).

[15] H.R. Doc. No. 457, 68th Cong., 2d Sess. 4 (1925).

[16] *Hearings before the House Committee on Banking & Currency on H.R. 6855*, 68th Cong., 1st Sess. 34 (1924). See also pp. 17 and 30.

branching opportunities by granting national banks the right to establish branches in their home-office towns, where such branches were permitted state banks by state law, and by limiting branching by state bank members of the Federal Reserve System (then, as now, the largest of the state banks) to such in-town branches.[17] The House Report said:

> "The bill recognizes the absolute necessity of taking legislative action with reference to the branch banking controversy. The present situation is intolerable to the national banking system. The bill proposes the only practicable solution by stopping the further extension of state-wide branch banking in the Federal reserve system by State member banks and by permitting national banks to have branches in those cities where State banks are allowed to have them under State laws." [18]

And when the bill reached the floor, Representative McFadden, its sponsor, said that:

> "The business of banking is a competitive commercial enterprise like any other business which makes a profit through the rendition of service to the public. Under our financial system where in each State of the Union there are two systems of banking—National and State—each in natural competition with the other for business, it is necessary for their mutual existence that their charter powers be substantially equal. It is especially important that the national banks be not left in a position in the Federal reserve system, being compulsory members of that system, where they are unable to meet the competition from the State member banks." 65 Cong. Rec. 11296 (1924).

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[17] H.R. Rep. No. 583, 68th Cong., 1st Sess. 3 (1924).

[18] *Id.* at 5.

Later, after noting that many large national banks had withdrawn from the national banking system and entered the state banking system "in order to place themselves upon an equal competitive basis with the State banks in their respective localities," 65 Cong. Rec. 11297 (1924), he said:

> "I may say here that permission for national banks to meet the competition of State banks engaged in branch banking in certain large cities is absolutely vital to the maintenance of the national banking system. It is an economic fact easily demonstrated by reference to recent banking history that the national banks in those cities where the State banks are engaged in branch banking will gradually die out for want of the power to meet their competitors on equal terms unless this provision of the bill is enacted into law." 65 Cong. Rec. 11298 (1924).

The bill which passed the House, however, failed of passage in the Senate in the closing days of the 68th Congress.[19]

2. *The McFadden Act of 1927.* The bill which ultimately became the McFadden Act of 1927 passed during the 69th Congress. Competitive equality was achieved by granting national banks the right to have intra-city branches "if such establishment and operation are at the time permitted to State banks by the law of the State in question," and, at the same time, limiting state bank members of the Federal Reserve System to intra-city branching. 44 Stat. 1228 (1927), as amended 12 U.S.C. § 36(c) (1964); 44 Stat. 1229 (1927), 12 U.S.C. § 321 (1964).

One important additional indication of the mood of Congress in making it clear that the question of the desirability of branches was a matter strictly up to the *states*

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[19] H.R. Rep. No. 83, 69th Cong., 1st Sess. 2 (1926).

to decide emerged from the Senate rejection of the so-called "Hull amendments" to the House bill. The House bill (H.R. 2) had originally proposed that national banks and state member banks might only establish inside branches in states permitting such branches at the time of the enactment of the bill.[20] No right was given to such banks if, at a *later* time, state law permitted state banks to establish inside branches.[21] The Senate Banking and Currency Committee, however, struck that provision on the grounds that it constituted an unwarranted "pressure" by Congress on state legislatures to decline to expand branch authority, and that the matter of branching privileges was a matter for the *states* to decide. It said:

> "The real purpose of the Hull amendments, as shown by the testimony given before your committee, is to bring pressure to bear upon the leading bankers in States which now prohibit branch banking by depriving them of the motive to seek a change in the State laws favorable to branch banking. It is to coerce them to remain silent. Your committee feels that this is an unprecedented policy for the Federal Government to pursue and constitutes an unwarranted interference with the rights of citizens of these States in their relationship to the State legislatures." [22]

The specific language contained in Section 7 of the bill reported by the Senate Banking and Currency Committee provided:

> "(c) A national banking association may, after the date of the approval of this act, establish and operate

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[20] Note 19, *supra*, at 4-5.

[21] These amendments were made on the floor of the House to H.R. 8887 which had passed the House the previous Session. H.R. 2 was substantially the same bill as H.R. 8887. H.R. Rep. No. 83, 69th Cong. 1st Sess. 2 (1926).

[22] S. Rep. No. 473, 69th Cong., 1st Sess. 9 (1926).

> new branches within the limits of the city, town, or village in which said association is situated if such establishment and operation are at the time permitted to State banks by the law of the State in question." [23]

Section 9 also provided that no state member bank of the Federal Reserve System

> ". . . may retain or acquire stock in a Federal Reserve Bank except upon relinquishment of any branch or branches established after the date of the approval of this act beyond the limits of the city, town or village in which the parent bank is situated." [24]

The Report concluded:

> "The bill recognizes the absolute necessity of taking legislative action with reference to the branch banking controversy. The present situation is intolerable to the national banking system. The bill proposes the only practicable solution by stopping the further extension of state-wide branch banking in the Federal reserve system by State member banks and by permitting national banks to have branches in those cities where State banks are allowed to have them under State laws." [25]

The Senate position was adopted in Conference.[26] The bill was finally approved on February 25, 1927, and became known as the McFadden Act of 1927. Representative McFadden in explaining the bill as finally passed, said:

> "As a result of the passage of this act, the national bank act has been so amended that national banks are able to meet the needs of modern industry and commerce and *competitive equality* has been estab-

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[23] *Id.* at 3.

[24] *Id.* at 4.

[25] *Id.* at 14.

[26] H.R. Rep. No. 1481, 69th Cong., 1st Sess. 6 (1926).

lished among all member banks of the Federal reserve system." 68 Cong. Rec. 5815 (1927) (Emphasis supplied.)[27]

3. *Banking Act of 1933.* During the depression, a fundamental challenge to the principle of competitive equality in branching occurred. Many persons felt that many bank failures during the Bank Holiday were due to the fact that small rural banks were not strong enough to weather economic adversity, and that these locations could best be served by branches of larger and stronger banks. Their view was that branch banking should be authorized for national banks *regardless* of state branch law in order to meet what was considered to be a crisis in banking.[28]

This view was also held by the dominant banking figure of the times, Senator Carter Glass of Virginia. He was the author of a bill, S. 4412, which was reported by the Senate Banking and Currency Committee in 1932, and which proposed to expand the authority of a national bank to establish branches granted in the McFadden Act of 1927 beyond just the municipality in which its main office was located, *irrespective* of state law. The Senate Report, in its section under "Insolvency of Banks," said:

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[27] The statute as finally passed also contained a grandfather clause applicable to all pre-1927 branches. It also imposed one additional restriction upon branching by national banks, regardless of whether state law permitted unlimited intra-city branching, by including a provision limiting the number of branches in cities with a population of 100,000 persons. 44 Stat. 1228. This provision was repealed by the Banking Act of 1933 and replaced with a provision gearing the number of branches to a graduated bank capitalization dependent upon population, 48 Stat. 162-190, which remained the law until 1952 when it was repealed. See H.R. Rep. No. 2423, 82d Cong., 2d Sess. (1952).

[28] See, *e.g.*, testimony of Comptroller of the Currency, J. W. Pole, during the 1931 hearings before the Subcommittee of the Senate Banking and Currency Committee. Hearings before a Subcommittee of Senate Committee on Banking & Currency pursuant to S. Res. 71, 71st Cong., 3d Sess. 7-10 (1931). See also, 75 Cong. Rec. 9896 (1932).

". . . provision for branch-banking powers under carefully qualified conditions with a view to making a larger experiment with branch banking is deemed essential and due provision for it is made. Specifically, what is proposed is the grant of power to establish branches of national banks not merely in the towns and cities in which they are located but also outside of such limits at any point within the borders of the State in which they exist, irrespective of State laws."[29]

This proposal met with vigorous opposition. It was obvious that if national banks were granted a competitive advantage over state banks in the matter of branching, state banks would convert to national banks and the state banking system would be destroyed, unless the state legislatures in all of the non-branch or limited-branch states moved immediately to conform their statutes to this unrestricted branch proposal—the reverse effect of the situation in 1922-27 when the Comptroller argued that unless national banks were given the right to branch in competition with state banks, the national banking system would be destroyed. Thus, Senator Norbeck, writing for the Minority of the Senate Committee "in protest against the proposed extension of the branch banking," said:

"In speaking of our banking system, we must keep in mind that we have:

(1) A system of national banks chartered and supervised by the Federal Government.

(2) We have a competitive system, that of State banks, chartered and supervised by the States.

There is difference of opinion among well-informed people as to their comparative merits, and certainly there is a great desire on the part of certain people to wipe out the State banking system. What can not be done directly by law may be done by giving the

[29] S. Rep. No. 584, 72d Cong., 1st Sess. 11 (1932).

national system such an advantage that the competitive system can not exist." [30]

The debate continued on the floor of the Senate in 1932 and 1933. Senator Glass pressed the need for statewide branching regardless of state law in order that larger, stronger banks could take over smaller rural banks and convert them into branches. 75 Cong. Rec. 9892, 9896-7 (1932); 76 Cong. Rec. 1995 (1933).

Senator Norbeck led the opposition proposing an amendment

> ". . . to strike out section 19 of the bill, which permits an enlargement of the branch-banking privileges.
>
> I do that mainly because I believe in the American system of banking. We have a dual system. We have two systems. We have one controlled by the States, we have another one controlled by the Federal Government. The two have grown up side by side. I think they have rendered splendid service, and I think we should be ever jealous of anything that will tend to destroy one system for the benefit of the other." 75 Cong. Rec. 9974 (1932).

Senator Glass' unlimited branch expansion position—regardless of state law—was eventually defeated.

The bill was finally passed after an amendment was adopted on the floor of the Senate whereby national banks could establish out of town branches if such branches could be established by state banks by the law of the state in question, thus restoring the principle of competitive equality. This amendment was known as the Bratton amendment, and, as it finally emerged, was itself amended by amendments of Senators Wheeler, Copeland and Blaine.

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[30] S. Rep. No. 584, 72d Cong., 1st Sess., Pt. II (Minority Views) 1 (1932).

Senator Bratton of New Mexico said:

> "I think the proposed bill goes too far. It seems to me that the question of whether branch banking shall be permitted in a given State should be determined by that State. . . . We are asked to permit national banks, in disregard of State laws, overriding the sentiment of a State, to engage in branch banking whether it is desired in the State or not." 76 Cong. Rec. 1449 (1933).

Accordingly, he proposed an amendment which read as follows:

> "A national banking association may establish and operate new branches within the limits of the city, town or village, or at any point within the State in which said association is situated, if such establishment and operation are at the time permitted to State banks by the law of the State in question." 76 Cong. Rec. 1997 (1933).

Senator Wheeler of Montana supported Senator Bratton. He said:

> ". . . I do not want the United States Government to permit the establishment of branches in States where the people by express statute have forbidden it; or where they have not passed upon the matter, I do not want to permit national banks to go in there and establish branches against the will of the people." *Ibid.*

He requested that the words "expressly authorized" be substituted for the word "permitted" in the Bratton amendment, which he explained as a desirable to handle his concern that a state statute silent on the matter of branching might be construed as permitting branch banking.[31]

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[31] The following interchange at 76 Cong. Rec. 1997 (1933) between Senators Glass and Wheeler set forth the purpose of the amendment:

[Footnote continued on following page.]

Senator Copeland also offered an amendment to the Bratton proposal reading: "if such establishment and operation are at the time permitted to State banks by the law of the State in question." 76 Cong. Rec. 2080 (1933).

The Bratton amendment "as perfected" was subsequently read by Senator Bratton as follows:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches within the limits of the city, town, or village, or at any point within the State in which said association is situated, if such establishment and operation are at the time expressly authorized for State banks by the law of the State in question. No such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a paid-in and unimpaired capital stock of not less than $500,000." 76 Cong. Rec. 2079 (1933).

[Footnote 31—Continued]

"Mr. GLASS: What is the difference between authorization and permission?

Mr. WHEELER: Quite a vast difference, if the Senator will permit me to say so, by reason of this fact:

In the State of Montana and in a number of other States there is no law expressly either prohibiting or permitting State branch banking; but the State bank examiner has held that there is nothing in the charter of the State banks permitting a branch bank. Under that construction, in my humble opinion, branch banks could be established in that State unless they were expressly prohibited by the law of the State. Consequently, I wanted a provision to be placed in the statute that branch banks shall not be permitted in a State unless the legislature or the people themselves, through an initiative, actually by law say that they shall be permitted there.

Mr. GLASS: Mr. President, I have never been in favor of subterfuge of any nature in legislation, and I am sure the clear-headed distinguished Senator from New Mexico is not proposing to engage in any subterfuge.

Mr. WHEELER: Oh, no.

Mr. GLASS: What we mean is that national banks may have branches in those States which permit the same privilege to State banks."

At this point, the following colloquy took place:

> "Mr. BLAINE. May I inquire further of the Senator if this language is embraced in the amendment which he proposes?—
>
> And under restrictions as to location imposed by the law of the state on State banks.
>
> Mr. BRATTON. Mr. President, that is not included in the text as I read it. The Senator from Wisconsin suggested that amendment to me; and if he proposes it, I shall be agreeable to it." 76 Cong. Rec. 2079 (1933).

Senator Blaine did not amplify or explain the purpose of his amendment and there was no further discussion of the matter. Including the Blaine amendment, the Bratton amendment then read:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches within the limits of the city, town, or village, or at any point within the State in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question and subject to the restrictions as to location imposed by the law of the State on State banks. No such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a paid-in and unimpaired capital stock of not less than $500,000." 76 Cong. Rec. 2205 (1933).[32]

As such, the amendment passed the Senate on January 21, 1933. 76 Cong. Rec. 2208.[33]

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[32] At the request of Senator Norbeck a proviso was added reducing the capital to $250,000 in states with less than 1 million population which have no cities of more than 100,000. 76 Cong. Rec. 2207 (1933). See note 27, *supra*.

[33] Immediately thereafter Senator Vandenberg withdrew an amendment which he had proposed as an alternative to the Bratton amendment. 76 Cong. Rec. 2208 (1933). Senator Vandenberg, like Senator Glass, proposed an amendment to permit branches of na-

No bill passed the House prior to the expiration of the 72d Congress. Accordingly, in May of 1933, both the Senate and House Committees on Banking and Currency favorably reported legislation, S. 1631, and H.R. 5661, which contained the Bratton amendment as passed in the prior session. S. Rep. No. 77, 73d Cong., 1st Sess. 11, 16-17 (1933); H. R. Rep. No. 150, 73d Cong., 1st Sess. 4 (1933).

Senator Glass in reporting on S. 1631 on the floor of the Senate, said:

> "There was another more or less important provision of the bill passed last spring which is retained in text in this bill, relating to branch banking. It will be recalled that, as reported from your Banking and Currency Committee, the provision authorized national banks to engage in branch banking in the respective States, regardless of State law. The Senate so amended that provision as to authorize national banks to engage in branch banking in those states which by law permit branch banking to State banks. It went even farther under the amendment of the distinguished Senator from New Mexico, and required that the establishment of branch banks by national banks in States which by law permit branch banking should be under the regulations required by State law of State banks.
>
> How any fair person may properly object to a provision of that sort, I do not understand. We here in

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tional banks regardless of state law, but with a more restricted privilege of branching limited to communities where there were no banking facilities whatever, or by the acquisition of an existing banking facility. 76 Cong. Rec. 1330 (1933). Senator Vandenberg characterized his amendment as one with respect "to proven need and to geography." 76 Cong. Rec. 2206 (1933). When the Bratton amendment, as amended, passed, thereby ending the debate, there was no point in pursuing the matter any further, and Senator Vandenberg withdrew his amendment stating that "with the geographical limitation in place any other limitation would be inappropriate." 76 Cong. Rec. 2208 (1933).

> the Congress created the national banking system in the emergency of the Civil War. We here restrict it and regulate it. We here legislate for the national banking system; and why anybody should object to putting national banks on a plane of *competitive equality* with State banks in the respective States we have been unable to understand. Therefore, we have included that provision in this bill just as it passed the Senate." 77 Cong. Rec. 3726 (1933) (Emphasis supplied.)

After passage by both the House and Senate, the bill went to Conference. The Conference Committee amended the phrase "law of the State in question" in the first part of the Bratton amendment to read "statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition." No explanation was given for the insertion of this language. At the same time the numbers of (1) and (2) were added to form the present subdivisions of Section 36(c). H.R. Rep. No. 254, 73d Cong., 1st Sess. 29 (1933).

During the debate in the Senate on the acceptance of the Conference Report, Senator Long of Louisiana, who had sought to defeat the provisions of the Glass bill, 76 Cong. Rec. 1330 (1933), and had joined in the filibuster against it, stated that "we have only undertaken to secure equal treatment for State banks" and that the Conference Report had substantially achieved that result. 77 Cong. Rec. 5862 (1933). While in the House, Representative Luce, a member of the Conference Committee, reported that another member of the Committee had

> ". . . withdrawn the obstacle in the way [of agreement] by consenting to branch banking in States that explicitly permit it for banks chartered under their own laws, such States being now a dozen or so in number. In the controversy over the respective merits of what are known as "unit banking" and "branch

banking systems", a controversy that has been alive and sharp for years, branch banking has been steadily gaining in favor. It is not, however, here proposed to give the advocates of branch banking any advantage. We do not go an inch beyond saying that the two ideas shall compete on equal terms and only where the States make the competition possible by letting their own institutions have branches. In short, we say only that if a State invites the race, let the better horse win. That system which proves itself the better able to serve the people will in the end prevail." 77 Cong. Rec. 5896 (1933).

The Banking Act of 1933 was finally enacted on June 16, 1933. National banks were permitted to establish out-of-town branches if such branches were authorized to state banks under state law. At the same time the restriction was removed on branches of state banks which were members of the Federal Reserve System, previously imposed by the McFadden Act of 1927. 48 Stat. 164, 12 U.S.C. § 321. Thus, the Banking Act of 1933 established the same competitive equality between national and state banks in the matter of branching outside city limits which the McFadden Act of 1927 had established for inside branches.

* * * *

The compelling conclusion reached from the foregoing review of the legislative history of the McFadden Act of 1927 and the Banking Act of 1933 is that Congress felt that it was imperative for the preservation of the dual banking system that there be competitive equality between national and state banks in the matter of branch banking. The manner in which Congress achieved that competitive equality was by adopting state law as the standard for the establishment of national bank branches.

The foregoing construction of the legislative history of Section 36(c) of the National Bank Act is now established law.

As noted at p. 15, *supra*, Sections 36(c)(1) and (2) were cited by this Court in *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559, 565 (1934) as representative of the "policy of equalization" established in the National Bank Act.

It was, of course, the construction given to the legislative history in the case below:

The district court said at 236 F.Supp. 457, 461 (Saxon R. 35):

> "If the Comptroller were permitted at this time to authorize branches for national banks when other banks in the city in question were not at the time and under the same conditions permitted by state law to branch, the Court feels that the purpose of Congress in enacting clause (1) of subsection (c) would not be met. In fact, the grave competitive imbalance which existed before 1927 would only be shifted to the detriment of state banks."

The court of appeals affirmed on the authority of the Tenth Circuit's decision in *Walker Bank & Trust Co.* v. *Saxon*, now before this Court as No. 51. The Tenth Circuit said at 352 F.2d 90, 94 (Logan R. 55):

> "With this, our review of the history of branch banking and § 36(c) ends. From it all, we are led to the inescapable conclusion that the purpose of allowing national banks to branch was to enable them to fairly compete with state banks. In enabling them to do this, Congress said in the McFadden Act that State law will in each instance determine whether to permit a national bank to branch. This policy was again carried over in the Banking Act of 1933 . . . ."

The Sixth Circuit, in holding that the Comptroller was prohibited by Section 36(c) from authorizing a national bank to establish a branch in a city after the establishment of a state bank there, in view of the provision of Michigan law that "no branch shall be established in a

city or village in which a State or National bank or branch thereof is then in operation," said in *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537, 540 (6th Cir.), *cert. denied*, 358 U.S. 830 (1958):

> "The history of federal legislation regarding branch banking and the statutes applying thereto leave a clear and definite impression that Congress intended, with respect to the location of branches, that a national bank should have no greater rights than it would if it were a state bank, and that a national bank was to be permitted to establish and operate a branch in a state only at such a point as it could, by express provisions of a state statute, establish and operate a branch if it were then a state bank."

The Fifth Circuit, in holding that where state law prohibits a bank from having more than one additional "bank office" in the same city, the state Superintendent of Banks has standing to raise the question whether a national bank's drive-in facility is a "bank office," said in *Jackson* v. *First Nat'l Bank of Valdosta*, 349 F.2d 71, 74 (5th Cir. 1965):

> "We start with the proposition that the source of First National's authority to open up the disputed drive-in window must be found in § 36(c) of the National Bank Act. That statute is explicit in providing that the substantive law of the state in which each national banking association is located fixes the bounds of such association's branching authority. We agree with the district court in this case and in South Dakota, supra, at 846, that Congress did not have to give this effect to state law. But it is highly significant that Congress did give it such effect and that it did so pursuant to a strong and distinct 'policy of equalization' for our dual banking system."

The reference to the "policy of equalization" no doubt came from the opinion of this Court in *Lewis* v. *Fidelity*

& Deposit Co., 292 U.S. 559 (1934). See p. 15, *supra*. The reference to "South Dakota" is to *South Dakota* v. *National Bank of South Dakota*, 219 F. Supp. 842 (D.S.D. 1963), *aff'd*, 335 F.2d 444 (8th Cir. 1964), *cert. denied*, 379 U.S. 970 (1965) where the court said, at 846:

> "It is clear that the purpose of Congress in adopting § 36(c) was to insure equality between state and national banks regarding the establishment of branches. . . . The adoption of § 36(c) was a practical way of accomplishing this purpose."

In addition to the foregoing, numerous other cases can be cited for the same proposition. Thus, in *Hoosier State Bank* v. *Saxon*, 248 F. Supp. 233, 236 (N.D. Ind. 1965), *appeal pending*, 7th Cir., Nos. 15561, 15562, the court said:

> "The legislative history of these sections [Secs. 36(c)(1) and (2)] pursuasively supports plaintiff's contention that the policy and purpose behind both sections was to foster competitive equality between federal and state banks 'in at least the most important areas of competition between the two systems' including location restrictions as to branching."

In *Bank of Dearborn* v. *Saxon*, 244 F. Supp. 394, 401 (E.D. Mich. 1965), *appeal pending*, No. 16912, 6 Cir., the court said:

> "It will be observed in the above statutory enactment [Sec. 36(c)] that the law of the state involved is to be determinative as to the problem of branching. National Banks were given the same opportunity for branching as state banks, thus perpetuating the dual banking system."

See, also, *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770 (D.D.C. 1959), *aff'd per curiam*, 278 F.2d 871 (D.C. Cir. 1960); *Union Savings Bank of Patchogue* v. *Saxon*, 335 F.2d 718 (D.C.Cir. 1964); *Suburban Trust Co.* v. *National Bank of Westfield*, 222 F. Supp. 269 (D.N.J. 1963); *Peoples Bank-Trenton* v. *Saxon*, 244 F.

Supp. 389 (E.D. Mich. 1965); *State Chartered Banks in Washington* v. *Peoples Nat'l Bank of Washington*, Civ. No. 6338, W.D. Wash., Feb. 28, 1966.

Thus the principle for which the Respondent contends, namely, that the language and legislative history of Section 36(c) of the National Bank Act reflects the intent of Congress to establish competitive equality between national and state banks in the matter of branching, is now existing law under decisions of the courts of appeals for the Fifth, Sixth, Tenth, and District of Columbia Circuits, and as well in decisions of district courts in the Third, Seventh, Eighth, and Ninth Circuits.[35]

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[35] Petitioners seek to distinguish the foregoing massive weight of authority against their position on the tenuous grounds that other than the two cases below and the *Jackson* and *Hoosier State Bank* cases which arose under Section 36(c)(1) of the Act, all of the cases cited involved an "outside" branch situation specifically falling under Section 36(c)(2), rather than an "inside" branch falling under Section 36(c)(1), the provision here involved. However, the courts in studying the legislative history of Section 36(c) in those cases did not limit their study to Section 36(c)(2). Their conclusion that Congress intended competitive equality between national and state banks in the matter of branching was based upon a study of *both* subsections 36(c)(1), enacted in the McFadden Act of 1927, and 36(c)(2), enacted in the Banking Act of 1933. Further, it must be noted that all Petitioners in this case freely discuss the legislative history of the Banking Act of 1933 in their briefs as relevant to a determination of the issue before this Court, which would strongly suggest that they do not really attach any significance to the "distinction" which they offer to the foregoing cases. Their position, candidly stated, is that all of these cases are wrong and should be reversed by this Court.

C. *The construction given to Section 36(c)(1) of the National Bank Act by the Comptroller conflicts with the plain meaning of the words used therein, and violates congressional intent to insure competitive equality between national and state banks in the matter of branching.*

1. *The establishment of a* de novo *branch in Ogden, a city with four banks, is not "expressly authorized" under a Utah statute which prohibits* de novo *branches in any city of the size of Ogden "in which is located a bank or banks."*

Section 36(c)(1) of the National Bank Act, 12 U.S.C. § 36(c)(1), provides that national banks may establish "inside" branches:

> ". . . if such establishment and operation are at the time *expressly authorized* to State banks by the law of the State in question . . . ." (Emphasis supplied.)

The Utah Code prohibits *de novo* branching in cities of the "second class" where there is already a bank or banks in operation. With regard to these cities Utah Code Ann. § 7-3-6 (Supp. 1965) provides that:

> " . . . no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such a branch shall take over an existing bank."

Respondent submits that it is impossible to read the foregoing words and conclude, as the Comptroller does, that a *de novo* branch can be said to be "expressly authorized" in Ogden, a city with four banks, under a state statute which prohibits *de novo* branches in a city "in which is located a bank or banks."

Respondent further submits that the Comptroller's *contra* argument, at pp. 15-19 of his Brief, is fundamentally an erroneous play on words. The Comptroller argues that

the Utah statute quoted above must be read as authorizing state banks to establish branches in their home cities with the acquisition provision establishing the "method" by which this is accomplished. He then argues that the only state law restrictions made applicable to national banks are those stating "whether and where" branches may be established; and that the "method" provision in the Utah statute does not fall into the "whether and where" category.

The Comptroller errs in each step of this contrived argument.

First of all, the very premise of the Comptroller's argument is a misreading of the provision of the Utah statute prescribing the extent to which state banks may establish branches in cities, other than cities of the "first class," where there is already located a bank or banks. That statute does *not* permit unrestricted branch banking with a "method" established as that of "take-over." It provides that there shall be "no branch" established in a city where there is located an existing bank, unless it is the continued operation of the offices of an acquired bank by an acquiring bank. That is a flat prohibition against *de novo* branching, the issue here involved.[36]

Secondly, having erroneously construed the Utah statute as containing a "method" restriction, the Comptroller argues that "method" restrictions do not fall within the scope of the "whether and where" restrictions which, he asserts, are the only state law restrictions which Congress

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[36] The Comptroller's loose and broad construction of the Utah branch statute is *contra* to that given to it by the Utah Supreme Court. That court described the Utah branch statute as "restrictive," and has stated that "what it does not expressly permit, it prohibits." *Walker Bank & Trust Co.* v. *Taylor*, 15 Utah 2d 234, 236, 390 P.2d 592, 594 (1964). The court based this decision, in part, upon the fact that from 1911 through 1933 Utah absolutely prohibited all branch banking, and that the limited authority permitted in 1933 was under "restrictive conditions."

intended to apply to national banks. This argument, too, is a play on words. When a state prohibits *de novo* branching "in any city or town in which is located a bank or banks," that is just as much a clear cut statutory statement of "whether" branches can be established, and "where" branches can be established, as is a provision which states that there shall be no branching at all, or no branching outside of the city, or no branching outside of the home office county. All of these provisions specify a *location* at or in which branching is restricted.

Since it is clear that the Utah restriction here involved is a "whether and where" or "location" requirement applicable to national banks, as the Comptroller would use those terms, it is not necessary to consider the further argument, pressed with considerable vigor by the Petitioners, that "all" state branch restrictions are not applicable to national banks under Section 36(c)(1). However, because this argument indicates the depth to which Petitioners have misread Section 36(c), additional comment is warranted.

Petitioners base their contention that "all" state restrictions are not applicable to national banks under Section 36(c)(1) primarily upon the ground that Section 36(c)(2) contains the phrase "and subject to restrictions as to location imposed by the law of the State on State banks," whereas Section 36(c)(1) does not do so.

Petitioner, First National Bank, in No. 51 appears to argue that this phrase in Section 36(c)(2) demonstrates a congressional intent to have a more relaxed standard of competitive equality between national and state bank branches in Section 36(c)(1) than in 36(c)(2), although precisely why this is so is not made clear.[37] In any event, there is nothing in the legislative history of the McFadden

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[37] Br., p. 33 *et seq.* See, also, the opinion of the district court in No. 51 at Logan R. 42-43.

Act of 1927, enacting Section 36(c)(1), indicating any different standard of competitive equality than that required by the Banking Act of 1933, where Section 36(c)(1) was *re-enacted*, with the phrase "expressly authorized" substituted for the word "permitted," and where Section 36(c)(2) was added to the statute. Throughout the course of the debates on both statutes, considered at length at pp. 18-32, *supra*, the identical theme of competitive equality emerges, although as a result of various floor amendments to the Bratton amendment in 1933, a difference in language appears in the two subsections. *Both* subsections, as this Court stated in *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. at 565, reflect the "policy of equalization" adopted by Congress in the National Bank Act.

Petitioners, First Security, and the Comptroller, take a somewhat different tack and argue that the "restrictions as to location" language in Section 36(c)(2) indicates a congressional intent that "all" restrictions are not applicable to Section 36(c), read as a whole, because to contend otherwise would be to give no significance to this phrase.[38]

As noted, at p. 29, *supra*, the "location" language was added to the Bratton amendment at the request of Senator Blaine, without discussion, during the floor debates on the bill ultimately enacted as the Banking Act of 1933. The intent of the language, it would appear to Respondent, was nothing more than to assure that the standards in state law to be applied to national banks were easily ascertainable objective standards, unambiguously designating where a branch could be established. Thus the usual standard in a state branch banking statute of a finding by a state Bank Supervisor of a "public need" for a branch involving, as it does, a judgment evaluation of facts, was obviously not the easily ascertainable objective type of restriction which Congress intended to be applicable to national banks. This is the sense of the language

[38] Comptroller's Br., p. 16; First Security's Br., p. 9.

in *First Nat'l Bank of Smithfield* v. *Saxon*, 352 F.2d 267 (4th Cir. 1965) cited by Petitioners,[39] and, indeed, with which Respondent is in accord. Respondent's construction of the "restrictions as to location" language is consistent with the theme of competitive equality pervading the legislative history of Section 36(c) and also preserves the duality of the dual banking system by assuring independent judgment on discretionary matters relating to national banks by the Comptroller alone.

In any event, the Utah branch statute here involved is precise and specifically states locations at which a branch may or may not be established. It provides that no *de novo* branches shall be established in a city, such as Ogden, in which there is located another bank or banks. Since a *de novo* branch is not "expressly authorized" in the city of Ogden with its four existing banks, the language of Section 36(c)(1) bars any authorization by the Comptroller to the Petitioner, First Security, to establish a branch in Ogden.

2. *The Comptroller's construction of Section 36 (c)(1) permitting national banks to branch in locations forbidden to state banks is irreconcilable with the principle of competitive equality which Congress sought to establish in Section 36(c), and which is imperative for the very survival of the dual banking system.*

At pp. 18-32, *supra*, Respondent has demonstrated the positive, unequivocal, and dominant expression of congressional intent in Section 36(c) of the National Bank Act to insure *competitive equality* between national and state banks in the matter of branching.

There can be no argument over the fact that the construction given to Section 36(c) by the Comptroller, re-

[39] The *Smithfield* case was principally concerned with the procedural question of whether the Comptroller is required to hold a hearing in a branch application. 352 F.2d 267, 268-71.

jected by both the courts of appeals for the District of Columbia and the Tenth Circuit in the cases below, would create *competitive inequality* between state and national banks in the matter of branching in every city in the State of Utah, other than a city of the "first class," of which there is now only one: Salt Lake City. National banks would be permitted to establish *de novo* branches at locations where there are existing banking offices, whereas state banks would not be permitted to do so. The only way in which state banks could establish a branch would be as a result of an acquisition in which they continued to operate the offices of an acquired bank. It is impossible to argue, and Respondent does not understand the Petitioners to so argue, that an unlimited right to establish *de novo* branches is competitively "equal" with a right to continue to operate the offices of an acquired bank as a branch.

Accordingly, the construction given to Section 36(c) by the Comptroller is utterly irreconcilable with congressional intent in Section 36(c) as demonstrated in the legislative history and cases deployed above. The purpose of the McFadden Act of 1927 was not to give national banks a *competitive advantage* over state banks in the matter of branching—the Comptroller's interpretation of Section 36(c)(1) in this case. It was to create *competitive equality.* And a similar purpose was evident in the legislative history of the Banking Act of 1933 in which Section 36(c)(1) was reenacted in connection with the passage of Section 36(c)(2).

The implications of this case go far beyond the state of Utah. The states of Connecticut, Kentucky, Maine, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, Oregon, South Dakota, and Washington also have statutes which restrict *de novo* branch banking in certain locations dependent upon whether there are existing banking offices at such locations but, nevertheless, permit the continued operation of the office of an acquired

bank by an acquiring bank at such restricted locations. See Appendix B. These twelve states include 1,028 of the 8,732 commercial insured state banks of the country, or 12%, holding some 37% of the assets of all of the state banks in the country.[40]

The state banks in these twelve states simply could not stand competitive inequality in the matter of branching *vis a vis* national banks, any more than the national banks could stand competitive inequality in the matter of branching with state banks prior to 1927, which situation occasioned the passage of the McFadden Act. They would be forced to convert to the national banking system. It is, therefore, no exaggeration to say that adoption of the Comptroller's construction of Section 36(c)(1) would spell the end of the dual banking system in these states.

The only way in which the congressional intent to insure competitive equality between national and state banks in the matter of branching can be maintained in this case is by a construction of Section 36(c)(1) and of the Utah statute as prohibiting *de novo* branching by *both* national and state banks in the city of Ogden. Respondent urges this Court to affirm the courts of appeals for the District of Columbia and the Tenth Circuit below in so holding.

The remainder of this Brief will be directed to two arguments advanced by the Petitioners, not already covered in the Respondent's affirmative case, that Congress somehow intended competitive *inequality* in the matter of branching in the state of Utah and in the eleven other states with similar branch statutes.

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[40] The preponderance of assets in the 1,028 banks is due to the fact that large banks in such important states as New York and New Jersey are included in the listing. See FEDERAL DEPOSIT INSURANCE CORPORATION, ASSETS, LIABILITIES, AND CAPITAL ACCOUNTS, COMMERCIAL AND MUTUAL SAVINGS BANKS, REPORT OF CALL NO. 74 (December 31, 1965).

II. The Comptroller's "Anti-Competitive" Argument Is Not Responsive to the Issue In This Case, Misconstrues the Legislative History of Section 36(c), and Is Self-Contradictory.

The major thrust of the Comptroller's Brief, and, apparently, the point upon which his entire theory of the case revolves, may generically be termed an "anti-competitive" approach. After characterizing the Utah statute as one permitting unrestricted branch banking by "take-over" designed to "encourage" bank mergers leading to undesirable banking "concentration," he argues that the "take-over" provision should be ignored, insofar as national banks are concerned, because it (a) is against public policy as revealed in federal antitrust and bank merger statutes and (b) is contrary to legislative intent revealed in the arguments of those who unsuccessfully sought to prohibit all branch banking during the legislative debates leading up to the enactment of Section 36(c). With the "take-over" provision read out of the Utah statute, the Comptroller then concludes that national banks are permitted to establish *de novo* branches in locations prohibited by state law to state banks.

Respondent will now demonstrate that this unique construction of Section 36(c), first proposed by the incumbent Comptroller some thirty-six years after the passage of the McFadden Act of 1927, is irrelevant, erroneous, and self-contradictory.

1. *The Comptroller's argument is not directed to the issue in this case.* The Comptroller's quarrel with the Utah statute does not seem to be with the provision that prohibits *de novo* branching in a city in which there is a bank or banks already doing business—the issue in this case. He would apparently concede that such a provision, standing alone, would be binding upon the Comptroller.[41]

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[41] See the Comptroller's Petition for Writ of Certiorari, at p. 12, where he apparently concedes that state branch restrictions as to the

He could hardly do otherwise. The applicability of such a provision has received judicial confirmation, *e.g.*, *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537 (6th Cir.), *cert. denied*, 358 U.S. 830 (1958), and even the Comptroller would apparently hesitate to strike down a branch statute of this general type, presently in effect in seventeen states,[42] upon an "anti-competitive" argument contrived some thirty-six years after the applicable provision of law was enacted.

The Comptroller's quarrel seems to be with joining a provision limiting *de novo* branches in a location with existing banks, with a provision permitting the retention of the office of an acquired bank by an acquiring bank as a branch. His challenge is to this "take-over" provision, as he terms it, in effect in Utah and eleven other states, and he argues that such a provision is "anti-competitive" and therefore should be read out of the statute insofar as national banks are concerned.

But, where does such an argument leave the Comptroller?

He has missed the whole point of *this* case. The issue *here* is whether the Comptroller may authorize a national bank to establish a *de novo* branch in a city in which there is a bank or banks doing business when state banks, by state law, are prohibited from doing so. There is no issue here involving the "take-over" of a bank and its conversion to a branch. Thus, even if the "take-over" provision were read out of the statute, as far as national banks

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number of branches in any location are applicable to national banks. In any event, the point is not argued in his Brief to this Court.

[42] Alabama, Connecticut, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New Mexico, New York, Oregon, South Dakota, Utah, and Washington, restrict *de novo* branching in territories (variously defined) where there is a bank or banks.

were concerned, the Comptroller would still be left with the remainder of the Utah statute which prohibits *de novo* branching under the circumstances here present. He *still* could not authorize the requested branch of First Security.

Accordingly, to a significant extent the entire discussion in the Comptroller's Brief hypothecating on the evils of bank concentration resulting from the "take-over" provision is irrelevant. But even that irrelevant argument is wrong, as will now be demonstrated.

The Comptroller considers the establishment of a branch by "take-over" as if it were an *independent* branch authorization, as is the case of the authorization of a *de novo* branch. It is not. It is a *resultant* from another transaction, namely, an *acquisition* of one bank by another, which is itself the subject of independent scrutiny. The Comptroller errs when he suggests that there is no statutory provision which would preclude a single bank from coming to dominate the entire banking industry of Utah. (Comptroller's Br., p. 36).

There are several. The Sherman Act of 1890, 15 U.S.C. §§ 1-7, is applicable to banks, and only recently this Court sustained an action by the United States to block a consolidation of two banks in Lexington, Kentucky, as constituting a combination in restraint of trade and commerce in violation of Section 1 of the Sherman Act. *United States* v. *First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1964). Further, as this Court also recently held in *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), Section 7 of the Clayton Act, 15 U.S.C. § 18, was applicable to stock acquisition of banks from 1914 through 1950 at which time it was extended by the Celler-Kefauver Anti-Merger Act to include bank mergers.[43] In addi-

[43] The foregoing transaction would cover all practical forms of a "take-over" of a bank and its conversion to a branch, as contemplated in the Utah statute. As this Court has noted, an assets-ac-

tion, the Bank Merger Act of 1960, 12 U.S.C. § 1828(c) (1964), as amended by P.L. 89-356, Feb. 21, 1966, provides for an elaborate review of all bank acquisitions involving insured banks.[44] If "the acquiring, assuming, or resulting bank" is a state member bank, approval is required by the Federal Reserve Board; if a state nonmember bank, by the FDIC; and if a national bank, by the Comptroller. 12 U.S.C. § 1828(c) (2), as amended by P.L. 89-356, Feb. 21, 1966. Standards for approval are set forth, including consideration of "competitive factors," and each agency is directed to receive reports from the Attorney General and the other two banking agencies on this standard. By the 1966 amendment, all bank mergers are prohibited whose effect in any section of the country may be to substantially lessen competition unless its adverse competitive effects are "clearly outweighed" by considerations of public need and convenience. 12 U.S.C. §§ 1828(c) (4)-(7), as amended by P.L. 89-356, Feb. 21, 1966.

Thus, the discussion of the dangers of "banking concentration" deployed at such length in the Comptroller's Brief is of doubtful relevancy. Congress has provided against such dangers by legislation applicable to bank acquisition to the extent it deemed necessary and desirable. Only after an acquisition has "cleared" this review, both federal and state,[45] does the question of the disposition of the

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quisition, excepted from Section 7 of the Clayton Act as far as banks are concerned because they are not subject to the jurisdiction of the Federal Trade Commission, "would not seem to be a fully effective method of corporate acquisition." *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 344 n. 22 (1963).

[44] More than 95% of all banks are insured by the Federal Deposit Insurance Corporation. *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 327 (1963).

[45] Utah Code Ann. § 7-6-2, also requires approval of bank mergers. Section 7-6-4C(4) requires a finding that the merger is not "contrary to the public interest." Section 7-6-4C(1) requires the

office of the acquired bank even arise. Some states require the office to be closed if branches are otherwise forbidden. Some states, like Utah, permit the continued operation of the branch.[46]

The point, however, is that the Comptroller's entire argument relating to the disposition of a branch following a bank acquisition has nothing to do with the central issue in this case. This Court is here concerned with the question of whether the Comptroller may authorize *de novo* branches at a location prohibited to state banks under state law.

2. *The Comptroller has misconstrued the legislative history of Section 36(c).* Conceding, *arguendo*, the relevance of the Comptroller's argument, the Comptroller further errs in that he has misconstrued the legislative history of Section 36(c).

The argument of the Comptroller is based upon the assumption that the legislative history of Section 36(c) revolved *exclusively* around a debate between proponents of branch banking, seeking to extend what they considered to be the merits of such a system, and the opponents of branch banking, seeking to block what they foresaw as "banking concentration" resulting from the expansion of city banks into rural areas. From this debate the Comptroller argues that Section 36(c) was basically a "compromise" involving a "concession" of the proponents of

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resulting state bank to meet all the requirements of state law as to the formation of a new state bank, and Section 7-1-26 includes among those requirements a finding that the ". . . location or field of operation of the proposed business shall [not] be in such close proximity to an established business that the established business might be unreasonably interfered with . . . ."

[46] The retention of the office of an acquired bank by an acquiring national bank is governed by the provisions of Section 36(b) of the National Bank Act which, like Section 36(c), is geared to state branch law. 12 U.S.C. § 36(b) (1964).

branch banking to the opponents of branching, from which he concludes that a "take-over" provision, such as the one in the Utah statute, allegedly associated "in the minds of the opponents" of branching with "banking concentration" could never have been intended as a state restriction applicable to national banks.

The Comptroller is clearly in error with regard to his interpretation of the legislative history of the McFadden Act of 1927, in which the provisions of Section 36(c)(1) —the applicable statutory provision in this case—were enacted. The legislative history of the McFadden Act did not turn upon the issue of whether branch banking should be extended to communities where that sort of banking could be useful. It turned on the issue of *competitive equality* between national and state banks in the matter of branching —the very principle which the Comptroller would ignore here. Thus, the concern expressed by the Comptroller of the Currency both in his Annual Reports prior to the McFadden Act of 1927 and during hearings before Congress, was *not* with the desirability of inside or outside branching *per se*. See pp. 18, 19, *supra*. It was with the necessity of giving national banks "the opportunity to meet the competition of State banks in intra-city banking" which he considered necessary for the very survival of the national banking system. See p. 19, *supra*. Accordingly, he proposed legislation which would give national banks the right to branch where state banks had such a right, *not* irrespective of state law.

The mode which Congress adopted to accomplish this result was (1) to grant national banks the right to establish branches in their home-office towns, where such branches were permitted state banks by state law, and (2) to restrict branching by state member banks of the Federal Reserve System (then, as now, the largest of the

state banks) to such inside branches.[47] Thus, as Representative McFadden, the sponsor of the bill stated:

> "*competitive equality* has been established among all member banks of the Federal reserve system." 68 Cong. Rec. 5815 (1927) (Emphasis supplied.)

Accordingly, the Comptroller's reading of the legislative history of the McFadden Act of 1927 as a "compromise" between "proponents" and "opponents" of branch banking, embracing an intent to exclude state branch restrictions associated in the "minds of the opponents" with the evils of branch banking, is an unsupportable theory.

Competitive equality was also the dominant theme of the Banking Act of 1933 relating to outside branches. It is true that there the proponents of branch banking urged unlimited branch banking for national banks without regard to state law as a matter of policy, but they were defeated as much on the grounds that any such action would destroy competitive equality between national and state banks, as they were by the vigor with which the opponents of branch banking spelled out the dangers which they attached thereto. See pp. 26-28, *supra*. The bill which finally passed reaffirmed the principle of competitive equality, as Senator Glass, the author of the Banking Act of 1933, stated in his summation on the floor:

> "We here legislate for the national banking system; and why anybody should object to putting national banks on a plane of *competitive equality* with

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[47] Indeed, Congress could do no more. Its authority over state member banks stemmed entirely from the fact that they voluntarily accepted federal regulation as the "price" for the benefits of membership in the Federal Reserve System. See *Westfall* v. *United States*, 274 U.S. 256, 258-9 (1927). It is doubtful whether Congress would have had the constitutional authority to restrict branching of *nonmember* state banks. Of course the Banking Act of 1933 placed national banks on a plane of competitive equality with *all* state banks by removing any restriction on branching in accordance with its policy of permitting national banks to branch anywhere to the extent permitted state banks under state law.

> State banks in the respective States we have been unable to understand." 77 Cong. Rec. 3726 (1933). (Emphasis supplied.)

Thus, the Comptroller's argument as to the type of state branch restrictions which Congress intended to be applicable to national banks, based upon a surmise of the type of restrictions which the opponents of branching had in mind when they "compromised" with the proponents of branching, is not supportable in the light of the one unequivocal and dominant theme of the legislative debates: competitive equality between state and national banks in the matter of branching. It is that principle which is patently violated by the construction which the Comptroller has given to Section 36(c)(1) of the Act.

Finally, there is one other salient point in the legislative history of Section 36(c) which the Comptroller has overlooked and which is dispositive of the argument he advances.

At the time the McFadden Act was passed, there was at least one state which permitted the retention of the office of an acquired bank by an acquiring bank in locations where branching was otherwise prohibited.[48] At the time of the Banking Act of 1933, at which time Section 36(c)(1) was amended and reenacted, at least seven other states had such statutes.[49] Congress was certainly aware

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[48] MASS. GEN. LAWS ch. 172, §§ 44, 45, 46, as amended by Massachusetts Act 1922, ch. 396, p. 419 (numerical restriction on branches in a city inapplicable to branching by merger).

[49] Five of these statutes, including that of Utah, allowed branching by merger in communities in which branching was otherwise permitted only if there were no operating banks: Connecticut Public Acts 1933, ch. 274, § 1; Idaho Laws 1933, ch. 71, § 1, p. 116; Maine Laws 1933, ch. 34, pp. 184-5; Oregon Laws 1933, ch. 150, § 3, p. 172; Utah Laws 1933, ch. 6, § 1, p. 8. (All of these statutes had been passed before the enactment of the Banking Act of 1933 on June 16, 1933.) Other statutes allowed branching by merger within larger areas: Virginia Laws 1928, ch. 507, § 13, p. 134; Washington Laws 1933, ch. 42, § 5, pp. 228-9.

of state branch laws and, indeed, they were recited at various times during the debates.[50] Certainly if Congress had wished to carve out restrictions contained in statutes of this type from the principle of competitive equality established in Section 36(c) it could have done so. The Comptroller may not do so by a contrived theory drawn from the legislative debates some thirty-six years after Section 36(c)(1) was enacted.

3. *The Comptroller's "public policy" argument is self contradictory.* The Comptroller has argued that the "take-over" provision in the Utah statute is contrary to "public policy." Respondent will now demonstrate that it is the *Comptroller's construction* of Section 36(c)(1), *not* the Utah branch statute, which is contrary to public policy.

Petitioner, First Security, is by far the largest bank in Utah, with 45 branches located in 34 cities, constituting 33% of *all* of the banking offices (head offices and branches) in Utah.[51] It has combined resources in excess of $360 million (Saxon R. 10), many times larger than Respondent,[52] and, indeed, substantially more than Walker Bank & Trust Co., the second largest bank in the state with resources in excess of $240 million and 13 branches. (Br. of Pet. First Nat'l Bank of Logan in No. 51, p. 15). The Comptroller's construction of Section 36(c)(1) of the National Bank Act will permit First Security to establish *de novo* branches in some 37 cities all over the state of Utah where there are presently located state banks which

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[50] *E.g.*, 66 Cong. Rec. 924 (1924); 66 Cong. Rec. 1577 (1925); 67 Cong. Rec. 2834 (1926).

[51] FEDERAL DEPOSIT INSURANCE CORPORATION, OPERATING BANKS INSURED BY THE FEDERAL DEPOSIT INSURANCE CORPORATION (January 1, 1966; Jan.-July, 1966 Supps.). There are presently 136 insured head offices and branches located in Utah. *Ibid.*

[52] Saxon R. 15. At the time of Petitioner's complaint (Saxon R. 10), Respondent had resources amounting to $57 million. Commercial Security Bank Fiscal 1963 Statement.

would be forbidden by state law from even meeting the competition of this giant bank by establishing their own *de novo* branches.[53] At this point Respondent simply incorporates by reference most of the Comptroller's Brief dealing with the evils of banking concentration to demonstrate that his construction of Section 36(c) could not be more disastrous to public policy as reflected in a healthy, competitive, banking environment in the State of Utah.

The Comptroller further argues that the Utah statute "encourages" mergers contrary to public policy. But there is *nothing* which the Comptroller could possibly do to encourage *more* bank mergers than to construe Section 36(c)(1) as he has done here. If national banks are permitted to establish *de novo* branches in areas where state banks are forbidden such branches because of existing banks, then state banks and state authorities would tend to meet the competition from *de novo* branching by national banks by freely permitting state banks to acquire banks in order to convert them into branches. Then, and only then, would the Utah type statute "encourage" bank mergers—as a *direct* result of the Comptroller's construction of Section 36(c)(1).

As an alternative to the foregoing, Utah and the eleven other states with Utah type statutes could repeal the provision which permits an acquired bank to be retained as a branch by an acquiring bank. Such a repeal would then leave the provision against any branch banking in locations where there is an existing bank applicable to both national and state banks, thus restoring competitive equality. But such repeal is not in accord with public policy. The inability to continue to operate the office of an acquired bank by an acquiring bank would tend to be a deterrent to any bank acquisition.[54] *All* bank acqui-

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[53] Note 51, *supra*.

[54] Over 90% of all mergers take place in states that permit branching. The number of mergers in unit banking states is in-

sitions are not contrary to the public interest as even the Comptroller himself would agree judging from the large number of bank mergers which he has approved.[55] An acquisition can promote the public interest in instances of the acquisition of a failing bank, or of a bank without a continuity of management, or of a bank unable to secure needed increased resources, to name just a few of the meritorious reasons for a merger.[56] The Comptroller's construction of Section 36(c)(1), by forcing states to repeal provisions permitting an acquired bank to be retained as a branch by an acquiring bank, would block healthy mergers. It is obviously far more in the public interest, to permit, as at present, retention of the offices of an acquired bank as a branch, following an acquisition, and to rely upon the state and federal banking agencies, and upon the Anti-Trust Division of the Justice Department, to block any merger or acquisition which threatens to lead to banking concentration.

The remaining alternative available to Utah, and the eleven other states with Utah type statutes, faced with the Comptroller's construction of Section 36(c)(1) would be to simply give up, and permit statewide branch bank-

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significant. See Shull and Horvitz, *Branch Banking and the Structure of Competition*, 1 NATIONAL BANKING REVIEW 301-343 (Mar. 1964). Messrs. Shull and Horvitz are Senior Economists in the office of the Comptroller of the Currency.

[55] Under the Bank Merger Act of 1960, the Comptroller is required to publish his merger decisions, which he does in his Annual Reports. 100 COMPT. CURRENCY ANN. REP. v-vii (1962), lists 107 approvals and 7 disapprovals; 101 COMPT. CURRENCY ANN. REP. 64-67 (1963), lists 91 approvals and 2 disapprovals; and 102 COMPT. CURRENCY ANN. REP. 58-61 (1964), lists 90 approvals and no disapprovals.

[56] See, *e.g.*, 100 COMPT. CURRENCY ANN. REP. 23-158 (1962); 101 COMPT. CURRENCY ANN. REP. 68-188 (1963); 102 COMPT. CURRENCY ANN REP. 62-171 (1964), wherein the Comptroller indicates the public advantages flowing from each of these mergers.

ing. Such authority, available to both state and national banks, would restore competitive equality. But forcing states to change their laws would be patently contrary to the public policy expressed by Congress in Section 36 (c). There Congress made it clear that it did *not* intend to force states to follow federal law in the matter of branching.

During the legislative history of the McFadden Act of 1927 the Senate Banking Committee rejected a House proposal to permit branching only in those states *then* permitting branching. As noted at p. 22, *supra*, the Senate Banking Committee construed the House proposal as "pressure" on the states not to amend their laws so as to permit expanded branching authority, which the Senate Banking Committee considered as "an unwarranted interference with the rights of citizens of these States in their relationship to the State legislatures." And the Glass bill, ultimately enacted as the Banking Act of 1933, would have initially authorized statewide branch banking for national banks regardless of state law. See pp. 24-25, *supra*. Senator Glass candidly predicted "that if the Congress enacts this bill into law, there is not a State in the Union that will not promptly authorize its State banks to get on an equality of competition with the national banks by adopting the state-wide branch banking system." 75 Cong. Rec. 9892 (1932). As has been noted at pp. 25-32, *supra*, however, this proposal was *defeated* in favor of the principle of *competitive equality* between national and state banks in the matter of branching.

Finally, even if the Comptroller's construction of Section 36(c)(1) were successful in forcing Utah to change its law to permit statewide, rather than limited, branching, the net result would appear to contradict the goal for which the Comptroller apparently contends. The Comptroller ends his Brief (Comptroller's Br., p. 43 n.28) with reference to a table in his Appendix C demonstrat-

ing that Utah has fewer unit banks per capita than the national average, which he characterizes as the "anti-competitive" result of the Utah bank statute. But if Utah moved to statewide branch banking, would the change result in more unit banks which, presumably, the Comptroller would consider a desirable "competitive" result? The conclusions drawn by the authors of the study upon which he relies would demonstrate that precisely the *contrary* result would occur. They conclude:

> "There are currently more banks in states that permit limited branching than in states that permit statewide branching; and there are still more banks in states that do not permit branching at all." [57]

This is an obvious conclusion. If banking needs can be met by branching, fewer unit banks can be anticipated. Therefore, the comparison of the unit banks of Utah, a state with limited branch banking, with unit banks in the United States, including states with statewide branch banking, as the Comptroller has done in Appendix C of his Brief, simply reflects the relationship of the number of unit banks with the authority to branch, as Messrs. Shull and Horvitz have pointed out. The comparison does *not* reflect an "anti-competitive" or "competitive" effect.

The issue of *de novo* branching can be argued either way from a competitive standpoint. Senator Glass, a proponent of branching, considered unit bankers in small cities "monopolists" in resisting branching competition. 75 Cong. Rec. 9892 (1932). Other architects of Section 36(c) of the National Bank Act felt that the large city banks would "monopolize" banking in smaller cities if permitted unrestricted branching. Congress solved the problem within the framework of "competitive equality" between national and state banks in the matter of branch-

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[57] Shull & Horvitz, *Branch Banking and the Structure of Competition*, 1 NATIONAL BANKING REVIEW, 301, 315 (Mar. 1964) (Footnote omitted.)

ing by acceding to state laws reflecting variant economies and philosophies. The imposition of economic theory relating to bank mergers into *de novo* branching, with its resultant disruption of "competitive equality," leads to utterly contradictory and unacceptable results.

III. No Weight Should Be Ascribed to the Incumbent Comptroller's Construction of Law Made Thirty-Six Years After the Enactment of Section 36(c)(1) and Contrary to All Prior Administrative Practice.

Petitioner, First Security, argues that "the position taken by the Comptroller herein should be upheld unless clearly unreasonable." (First Security Br., p. 23 *et seq.*).

Whatever may be the salutary nature of the principle of ascribing weight to interpretative decisions of administrative and executive agencies, such a principle is clearly not applicable here.

Respondent submits that the construction made by the Comptroller in this case is absolutely unique. No similar administrative construction of the Act has been cited throughout the entire course of this litigation, and Respondent is unaware of any such interpretation made by *any* predecessor of the incumbent Comptroller.[58]

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[58] Decisions of the Comptroller in this regard are not published. Respondent calls the attention of this Court, however, to testimony before Congress of the prior Comptroller, Mr. Gidney, which would appear to run contrary to the construction given the statute by the present Comptroller. In urging an amendment to Section 36(b) of the National Bank Act relating to the retention of branches of a resulting national bank after merger, Comptroller Gidney was careful to point out that this proposed amendment did not conflict with "the purpose of existing law . . . to prevent a bank from acquiring branches where they could not be legally established under State law, by taking over other banks," (*Hearings before the Senate Committee on Banking and Currency (Study of Banking Laws)*, 84th Cong., 2d Sess. 27 (1956)), and "would involve no possibility of permitting avoidance of State branch banking laws or giving national banks competitive advantage over State banks in the

Section 36(c) was first enacted in the McFadden Act of 1927. In other words, *for over three decades*, from the McFadden Act of 1927 through the third year of the administration of the incumbent Comptroller (1963), no Comptroller had *ever* construed Section 36(c)(1) in a manner to disrupt competitive equality in the matter of branching between national and state banks in states with the Utah type statute. Accordingly, the unique construction made by the incumbent Comptroller in this case, some thirty-six years after the passage of the McFadden Act, based upon a contrived and strained construction of arguments advanced during the debates, and contrary to administrative practice of all of his predecessors, is entitled to no weight whatever.

Furthermore, the Comptroller's interpretation in this case is not based upon any factors reflecting his "more specialized experience" and "broader investigations" which could give some weight to his opinion. *Cf., Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139 (1944). It is an interpretation involving statutory construction, upon which the courts are undoubtedly far more expert than is the Comptroller. Certainly, this has been the attitude of the lower courts. The incumbent Comptroller is a vigorous advocate of branch banking and has frequently stated his restiveness with being bound by state branching laws.[59] His unique and liberal constructions of Section 36(c) and of state branching laws, which have generated a substantial

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matter of branching." *Hearings before the House Committee on Banking and Currency (Financial Institutions Act of 1957)*, 85th Cong., 1st Sess. 160 (1957).

[59] E.g. "The branching powers of National Banks should, in my judgment, not be limited according to those policies which the individual States find appropriate to meet their local needs through State-chartered banks." Saxon, *Branching Powers and the Dual Banking System*, 101 COMPT. CURRENCY ANN. REP. 316, 318 (1963).

amount of litigation during the past five years,[60] have been struck down time and again.[61] Respondent asks this Court to do so again here.

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted,

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[60] Prior to 1958 there had never been any litigation by a state bank challenging a branch decision of the Comptroller of the Currency. Since that time, there has been a flood of litigation, and, as will be noted from the citations at note 6, pp. 8-9, *supra*, all but two of these cases have arisen during the administration of the incumbent Comptroller (post 1959).

[61] See cases at pp. 35-36, *supra*. See also *Bank of New Orleans & Trust Co.* v. *Saxon*, 211 F. Supp. 576, 577 (D.D.C. 1962), *aff'd sub nom. Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 323 F.2d 290, 304 (D.C. Cir. 1963) (Comptroller enjoined from knowingly permitting unlawful de facto branch, in violation of 12 U.S.C. § 36, which he had approved "because he considered the end desirable"), *rev'd on procedural grounds*, 379 U.S. 411 (1965).

APPENDIX A

Summary of Branch Banking Statutes of the Fifty States

1. *States Permitting Unlimited Branch Banking*

Alaska

ALASKA STAT. § 06.05.415 (1962)

Arizona

ARIZONA REV. STAT. § 6-223 (1956)

California

CAL. FINANCIAL CODE § 500

Delaware

DEL. CODE ANN. tit. 5, § 770 (Supp. 1964)

Hawaii

Hawaii Sess. Laws 1965, Act No. 201, pp. 317-18, amending HAWAII REV. LAWS § 178-39 (1955)

Idaho

IDAHO CODE ANN. § 26-1001 (Supp. 1965)

Maryland

MD. CODE ANN. art. 11, § 65 (1957)

Nevada

NEV. REV. STAT. § 660.010 (1963)

North Carolina

N.C. GEN. STAT. § 53-62 (1965)

Rhode Island

R.I. GEN. LAWS § 19-1-13 (1956)

South Carolina

S. C. CODE § 8-57 (1962)

Vermont

VT. STAT. ANN. tit. 8, §§ 501 to 505 (1958), § 502a (Supp. 1965)

2. *States Permitting Restrictive Branch Banking*

Alabama

ALA. CODE tit. 5, §§ 125, 125(1) (1960)

Connecticut

CONN. GEN. STAT. § 36-59 (1962)

Georgia

GA. CODE ANN. § 13-203.1 (Supp. 1965)

Indiana

IND. STAT. ANN. § 18-1707 (Supp. 1963)

Kentucky

KY. REV. STAT. § 287.180 (1962), as amended by Ky. Acts 1966, ch. 11, § 2, p. 112-14

Louisiana

LA. REV. STAT. ANN. §§ 6:54 to 6:56, 6:244 (1950)

Maine

ME. REV. STAT. ANN. tit. 9, § 1003 (Supp. 1965)

Massachusetts

MASS. GEN. LAWS ch. 172, § 11 (Supp. 1965)

Michigan

MICH. STAT. ANN. § 23.762 (1957), § 23.762(1) (Supp. 1965)

Mississippi

MISS. STAT. ANN. §§ 5226 to 5236 (1956), as amended, May 16, 1966

New Hampshire

N.H. REV. STAT. ANN. § 384-B:2 (Supp. 1965)

New Jersey

N.J. STAT. ANN. § 17:9A-19 (Supp. 1965)

New Mexico
N.M. STAT. ANN. §§ 48-2-16 to 48-2-19 (Supp. 1965)

New York
N.Y. BANKING LAW § 105

Ohio
OHIO REV. CODE ANN. § 1103.09 (1953)

Oregon
ORE. REV. STAT. § 714.050 (1965)

Pennsylvania
PA. STAT. ANN. tit. 7, § 904 (Supp. 1965)

South Dakota
S.D. CODE § 6.0402 (1960)

Tennessee
TENN. CODE ANN. § 45-211 (1964)

Utah
UTAH CODE ANN. § 7-3-6 (Supp. 1965)

Virginia
VA. CODE §§ 6-26 to 6-29.1 (Supp. 1964) (Re-enacted as §§ 6.1-26 to 6.1-29.1, Acts 1966, ch. 584)

Washington
WASH. REV. CODE § 30.40.020 (1961)

3. *States Prohibiting All Branch Banking*

Arkansas *
ARK. STAT. §§ 67-205, 67-340 to 67-352 (1966)

Colorado
COLO. REV. STAT. § 14-3-1 (1963)

Florida *
FLA. STAT. § 659.06 (1965)

Illinois *

ILL. REV. STAT. ch. 16½, §§ 105, 106 (1965)

Iowa *

IOWA CODE § 528.51 (1962)

Kansas *

KAN. STAT. ANN. § 9-111 (Supp. 1965)

Minnesota *

MINN. STAT. ANN. § 48-34 (1946)

Missouri *

MO. STAT. ANN. §§ 362.105, 362.107 (Supp. 1965)

Montana *

MONT. REV. CODE § 5-1028 (Supp. 1965)

Nebraska *

NEB. REV. STAT. § 8-157 (Supp. 1963)

North Dakota *

N.D. CODE §§ 6-03-15 to 6-03-19 (1959), § 6-03-14 (Supp. 1965)

Oklahoma *

OKLA. STAT. tit. 6, §§ 501, 2061 (Supp. 1965)

Texas *

TEX. CIV. STAT. ANN. art. 342-903 (Supp. 1965)

West Virginia

W.VA. CODE ANN. § 3131 (1961)

Wisconsin *

WIS. STAT. ANN. § 221.04 (1957)

4. *States With No Legislation Authorizing Branch Banking*

Wyoming

* These states permit certain offices with limited powers only.

APPENDIX B

Summary of State Laws Which, Like the Utah Statute Involved in This Case:

(1) Restrict De Novo *Branch Banking In Certain Locations Dependent Upon Whether There Are Existing Banking Offices At Such Locations, But*

(2) Nevertheless Permit State Banks To Acquire A Branch By Merger At Such Restricted Locations

Connecticut
CONN. GEN. STAT. § 36-59 (1962)

Kentucky
KY. REV. STAT. § 287.180 (1962), as amended by Ky. Acts 1966, ch. 11, § 2, pp. 112-14

Maine
ME. REV. STAT. ANN. tit. 9, § 1003 (Supp. 1965)

Massachusetts
MASS. GEN. LAWS ANN. ch. 172, § 11 (Supp. 1965)

Mississippi *
MISS. CODE ANN. §§ 5226 to 5236 (1956), as amended, May 16, 1966

New Hampshire
N.H. REV. STAT. ANN. § 384-B:2 (Supp. 1965)

New Jersey
N.J. STAT. ANN. § 17:9A-19 (Supp. 1965)

New York
N.Y. BANKING LAW § 105

Oregon
ORE. REV. STAT. § 714.050 (1965)

South Dakota
S.D. CODE § 6.0402 (Supp. 1960)

Washington
WASH. REV. CODE ANN. § 30.40.020 (1961)

* Applies to branch offices; branch banks are governed by § 5229.